COMMENTARIES

ON

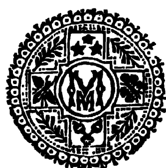
THE LIBERTY OF THE SUBJECT

AND

The Laws of England

RELATING TO

The Security of the Person.



COMMENTARIES

ON

THE LIBERTY OF THE SUBJECT

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RELATING TO

The Security of the Person.

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PREFACE.

It is more than a century since Blackstone published his *Commentaries on the Laws of England*, which were originally lectures delivered to students at Oxford. His object was to make the methodical study of those laws part of a university education. He had secured an audience of inquiring minds, full of fresh aspirations, but only dimly conscious of some vague influence by which the business of the world was guided, and more eager than certain how best to share that influence. Most of his audience were destined to be legislators, diplomatists, warriors, priests, heirs of great possessions, and a few were destined to the practice of the legal profession. But beyond that audience he sought to reach a still larger class of citizens, who were already engrossed with other pursuits—whether acting in various capacities as jurors, magistrates, and officials, or as the leading artificers of that wealth, with the pursuit of which human life is so busy. This wider circle must then, as now, have often been haunted with an unsatisfied desire to know more about the laws all were bound to obey, than could be acquired in any ordinary avocations. Though business is itself a legal education, yet it is seldom found to be sufficiently broad and deep to satisfy the wider scrutiny and insight of practical minds, always curious to probe the secrets of this vital essential

knowledge. For the whole of these constituents Blackstone endeavoured to clothe a theme, formerly dry and repulsive, with various learning, picturesque incidents, and apposite illustrations—solving doubts and largely gratifying the intelligent curiosity of every member of the community who aspired to influence his fellow-men.

How well Blackstone succeeded in his enterprise, his contemporaries and successors confessed and know.[1] The generations of Englishmen since his day have been indebted to him for nearly all they have learnt of the

[1] C. J. FOX: "Blackstone's style of English is the very best among our modern writers . . . . His purity of style I particularly admire. He was distinguished as much for simplicity and strength as any writer in the English language. He was perfectly free from all Gallicisms and ridiculous affectations, for which so many of our modern authors are so remarkable. Upon this ground, therefore, I esteem Judge Blackstone; but as a constitutional writer he is by no means an object of my esteem."—*Trotter's Fox*, 512; 6 *Parl. Deb.* 314, 814.

SIR W. JONES: "Blackstone's Commentaries are the most correct and beautiful outline that ever was exhibited of any human science; but they alone will no more form a lawyer than a general map of the world will make a geographer."—*Jones, Bailments*, p. 4.

GIBBON: "Blackstone's Commentaries may be considered as a natural system of the English jurisprudence digested into a natural method and cleared of the pedantry, the obscurity, and superfluities, which rendered it the unknown horror of all men of taste."—5 *Gibbon, Misc. W.* 545.

LORD MANSFIELD, C. J: "In Blackstone's Commentaries you will find analytical reasoning diffused in a pleasing and perspicuous style." —*Holliday's Mansfield*, 89.

LORD AVONMORE, C. J: "He it was, who first gave to the law the air of a science. He found it a skeleton and he clothed it with life, colour, and complexion. He embraced the cold statue, and by his touch it grew into health, vigour, and beauty."—*Phillips's Curran*, 74.

BENTHAM (1776): "Correct, elegant, unembarrassed, ornamented, Blackstone's style is such as could scarce fail to recommend a work still more vicious in point of matter to the multitude of his readers. He it is, in short, who, first of all institutional writers, has taught

wisdom of that civil polity and well balanced system of laws which he professed to expound. And even those of his own profession, who commenced their studies under the auspices of his teaching, and afterwards required to pursue their course into further and better particulars, have seldom outgrown the authority and deference which his name has gathered year by year as its natural tribute. He discoursed on doctrines, harsh and crabbed as they were, with the luminous force, spirit, and elegance of Addison, and there was nothing he touched, which he

jurisprudence to speak the language of the scholar and the gentleman ; put a polish upon that rugged science ; cleansed her from the dust and cobwebs of the office ; and if he has not enriched her with that precision which is drawn only from the sterling treasury of the science, has decked her out, however, to advantage from the toilet of classical erudition ; enlivened her with metaphors and allusions, and sent her abroad in some measure to instruct and in still greater measure to entertain the most miscellaneous and even the most fastidious societies. The merit, to which as much, perhaps, as to any, the work stands indebted for its reputation is the enchanting harmony of its numbers, a kind of merit that of itself is sufficient to give a certain degree of celebrity to a work devoid of every other. So much is man governed by the ear."—*Frag. on Gov.*

STORY J. : "Blackstone's Commentaries are but a compilation of the laws of England drawn from authentic sources, open to the whole profession, and yet in the highest sense might be deemed an original work, since never before were the same materials so admirably combined and exquisitely wrought out with a judgment, skill, and taste absolutely unrivalled."—Gray *v* Russell, 1 Story, 17.

WATKINS : "The intention of that ingenious writer (Blackstone) was to give a comprehensive outline, and when we consider the multiplicity of doctrine which he embraced, the civil, the criminal, the theoretical and practical branches of the law, we must confess the hand of a master. But in the minutiæ he is very frequently inaccurate."—*Watk. Convey. Introd.* 28.

MACKINTOSH : "Blackstone was a great master of classical and harmonious composition, but a feeble reasoner and a confused thinker, whose writings are not exempt from the charge of slavishness. . . . Bentham, in his *Fragment on Government*, wasted extraordinary

did not adorn. His fame has in no respect diminished after the lapse of a hundred years; nor is there any apprehension that, notwithstanding one or two resolute detractors, he will ever cease to be an English classic. Some of his political doctrines, indeed, have been described as scarcely acceptable even in his own age. If defects might be suggested, the worst seems to be, that his tone too generally was that of one who forgot the maxim, that men are not made for laws, but laws for men; and hence,

power in pointing out flaws and patches in the robe occasionally stolen from the philosophical schools, which hung loosely and not unbecomingly on the elegant commentator."—*Mackint. Eth. Phil.* sect. 6.

LORD ELLENBOROUGH, C. J.: "Judge Blackstone had produced the most elegant and classical work upon the driest subject in the language; by giving interest to the systematic knowledge of the law he had allured the student; and by the spirit and eloquence with which he set forth the code of England he had advanced her beyond calculation in the respect of other countries. He made the law of England studied in other countries, and thus threw a dignity round the wisdom of his own. I must be his grateful eulogist, for to him I was indebted for an easy and pleasant introduction into the thorny science of the law."—*H. of Lords*, 1812; 23 *Parl. Deb.* 1083.

AUSTIN: "Blackstone's method is a slavish and blundering copy of Hale's rude and compendious model. Neither in the general conception nor in the detail of his book is there a single particle of original and discriminating thought."—*Outlines*, p. 63.

LORD CAMPBELL says, "Blackstone, after Bacon, was the first practising barrister at the English bar, who in writing paid the slightest attention to the selection or collocation of words."—2 *Camp. C. J.* 566. In other countries "Alciati was the first who taught the lawyers to write with purity and elegance, and though the professors of the old school clamoured against him and drove him from one university to another, he soon stood not alone in scattering the flowers of polite literature over the thorny tracks of jurisprudence."—1 *Hallam, Lit. Hist.* 418. "Cujacius, like Alciati, substituted a general erudition for scholastic subtleties, and rendered the science more intelligible and attractive. When Cujacius' name was mentioned in the public schools of Germany, every one took off his hat." —2 *Hallam, Lit. Hist.* 167, 169.

he too lightly assumed to impress upon his fellow-countrymen, that they could never be too grateful for the excellence of those laws that had been found for them. Another defect which may be suggested is, that owing to his discourses being orally delivered, and certain topics requiring to be treated within a limited space of time, the relative importance of each was ill adjusted, and even his outlines of most vital doctrines were too meagre to be practically useful. And lastly, the method and arrangement were little calculated to satisfy the understandings of those, who for the first time explored so intricate a branch of knowledge—overladen at all times with its oppressive details. This last defect, indeed, was not apparent to his contemporaries, for they seem to have been most of all impressed by the lucid order in which he arranged his materials. This, however, tends rather to show, that the spell of the magician's style was over all who came near him, so that they scarcely had time to mark a blemish or hesitate a dislike, while he opened page after page of a book, so long sealed from their eyes, and written in a tongue so unfamiliar.

But, apart from any inherent defects of Blackstone's treatment and method, it is obvious that during the century that has elapsed since his work was published hundreds of volumes of statutes, reports, and disquisitions have been produced, modifying, reversing, or abandoning many false positions[1] once thought unassailable. And during the same period all European nations have lived ages. Communities, princedoms, powers, and dominions have disappeared and reappeared under new names or new

[1] It may be said of the Law as was said of Truth, that "in retiring from her outposts she has become more unassailable in her citadel." —2 *Hallam, Lit. Hist.* 127.

combinations. Organic changes have developed noiselessly in a night. All forms of government, constitutions, systems of laws, have more or less been put on their trial, and tested by the inexorable logic of first principles. Every timber of the vessel has felt the strain. Whatever and wherever a fault existed, the fault has been seen and felt, and in not a few instances has been amended. The utilitarian has been abroad, and has marked many a weak point in the armour; and instead of invoking the traditions of Greek or Roman, ancient or mediæval, civilisations to help him, has found a ruder questioning all sufficient, and a convenient touchstone in every market place and vestry. A friendly echo now follows this investigator everywhere. It can scarcely fail to be apparent, that explanations of processes, methods, and axioms, which passed current with the learned and wise a century ago, can scarcely now claim the plaudits of our wider and more critical audience. The legislature itself, which is the vigilant sentinel to guard against the advances of corruption and revolution, contains new representatives commissioned by multitudes who were then without the pale; powers and voices, not then dreamt of, now claim an undisputed hearing. New points of departure are suggested in many a settled routine, and still an interminable procession of amendments fills up the vista of the future. And though panting time toils after these in vain, yet is the hope of higher and still higher and juster laws not one jot abated. Civilisation[1] may be incapable of definition, yet it plainly involves a consciousness, that advancement has already been made from worse to better, and that from each

[1] GUIZOT says, the idea of progress or development is the fundamental idea in the word "civilisation."—*Civ. Europ.* lect. 1.

vantage ground gained it would be degrading and impious to retreat.

The Liberty of the Subject is, in England, a sounding phrase[1] and a watchword with which to conjure the multitude. It represents an "unknown quantity" of latent fire, which kindles with the slightest breath, which rouses a spirit not to be subdued, and is as contagious as it is irrepressible. Like the sacred fire watched by the Vestal virgins, it has now burned for centuries, and has never—or if ever, then for a short time only—been extinguished. It lives in many a golden line of Magna Charta, though antiquated details sometimes obscure it; and the Petition of Right, the Habeas Corpus Act, the Bill of Rights, Trial by Jury, the Law and Practice of Parliament, the Liberty of the Press and Local Self-government, breathe nothing else. Whether used in the senate and the courts, or shouted by the mob, this household phrase seldom fails to call up a crowd of noble associations. The masses of the community can feel it, though they cannot be sure that they can explain it.[2] It is to them an instinct and a manly prerogative, rather than a code. They know it as a healthy light to illumine their daily life; yet it requires the prismatic vision of the Lawyer to trace, where and how the primary colours are blended and transfused. For him it must in the end be always reserved to show, how these

[1] BURKE says, "Grand swelling sentiments of liberty warm the heart and liberalise the mind."—*Fr. Rev.*

[2] ADAM SMITH said, "The common people of England, so jealous of their liberty, like the common people of most other countries, never rightly understand wherein it consists."—*Wealth of Nat.* b. i. c. 10. "The French, Swiss, and German peasants have a fair knowledge of law. But in Great Britain and Ireland the same classes believe, that such knowledge is as exclusively professional as is the knowledge of anatomy."—*Maine's Village Com.* 60.

elementary colours are even more attractive than the shining ray.

To rescue the time honoured and healthy public cry of the "Liberty of the Subject" from the vague and rambling thoughts that too often accompany it in the street, the market, and the senate, and reduce it to a language and method which will make the citizens of all countries more akin, may be a difficult, but it can scarcely be an impossible task. The genius of the age is educational. It is no longer deemed a merit in courts of justice to register their decrees, yet to conceal their reasons. It is no longer deemed masterly statecraft to mask the motive powers and springs of legislation and government in secret fastnesses, and only disclose their existence by occasional volleys of thunder. With a free press and an inviolable senate, which think aloud for all the constituent forces in the nation, every intelligent citizen breathes an atmosphere of criticism and discussion, and goes along with each difficult conjuncture, as if he felt and enjoyed being a part of the complex mechanism. He lives and moves in the general system. There being nothing to conceal, and there being nothing but natural growth and development desired in all directions, it is now more than ever a necessity, that he should have visibly and tangibly familiar to him the innermost workings and free play of our national institutions in all their phases. It must, however, be confessed, that the law is a part of our daily life, which still suffers too much dispraise and eclipse in the public esteem. Notwithstanding the translucid medium, under which Blackstone revealed its interior works, the cultivated intelligence of the crowd still marks unseemly rust and cobwebs defiling the movements; and even the friendly

eye darkens as the finger of scorn resolutely points here and there.

The Liberty of the Subject has a twofold meaning. That it indicates the line, beyond which the crown cannot lawfully interfere with the person or property of the subject, is naturally the first thought that occurs to all. Law, as Lechmere observed,[1] is the common measure of the power of the crown, and of the obedience of the subject. But in its wider and higher sense, the liberty of the subject is not and cannot be confined to the mutual relations between the crown and each individual: it also includes the relations between subject and subject. When the individual is imprisoned or stripped of his property by an unlawful authority, whether that authority purports to be exercised by the crown and its servants or by a fellow-citizen, the liberty of the subject is equally invaded, though the outrage may be resented in the one case more warmly than in the other. Hence it is, that when intelligent foreigners, and others interested, ask how and whence the chief elements of this magic phrase have been derived, it is by no means easy to satisfy the inquiring mind. To trace the various situations and proceedings of social life, where liberty is most conspicuous, and collect its essence and epitome, requires a wide excursion over most of the departments of the law. In order to exhaust the account, scarcely one of its provinces can be safely neglected. Yet while some of these, which lie closer, must be minutely examined, others may be surveyed from a distance. It is thus only that the whole prospect, with its light and shadow, can be made to fill the mind's eye, and to impress its full significance upon the memory.

[1] Sacheverell's Trial, 15 St. Tr. 61.

While an exhaustive account of the Liberty of the Subject in England thus really resolves itself into an exposition of the law, or at least a survey of all its leading landmarks, the difficulty of rendering that account satisfactory is at once apparent; and at the same time the reason is disclosed, why so few intelligent citizens can go deeply into it, and why so vague an impression is often left on the inquirer by the explanations that are offered. It scarcely, however, accounts for the want of any systematic attempt having yet been made to treat this subject with the fulness and practical detail naturally to be expected, considering the ardent desire that must always exist to know more of it, not only in Great Britain, but in Greater Britain, and in foreign countries, where this crowning glory — the reputed end and aim of the English constitution—has acquired so just and enviable a renown. The author has here attempted to meet this want and achieve a difficult task. In his view the central idea involved in the English Liberty of the Subject becomes, on a complete analysis, the polar axis on which all the municipal laws revolve, and its various evolutions suggest a more true and rational division of those laws, than has hitherto been current. And the adoption of a more natural distribution and arrangement of the materials is not only valuable in itself, but it will confer all the greater advantage, if, as the author hopes and expects, the citizens of all other countries will be thereby provided with a ready means of comparison between their own laws and institutions, and those with which England has long found good reason to be well pleased.[1]

[1] De Tocqueville: "Look at England, whose administrative laws still at the present day appear so much more complicated, more anomalous, more irregular than those of France! Yet is there a

This book is thus a treatise on the laws of England, following, however, an arrangement entirely new, the main object being to illustrate the leading principles and practices which intelligent citizens eagerly search for at all times in those laws. With a key to the details, all can more easily estimate the measure of civilisation that has been reached in a country, long envied for its successful avoidance of violent revolutions—where the equilibrium of liberty has never been lost during any entire generation —and where, year by year, it gains a stability, the secret of which must ever be a study for all nations and communities.[1]

country in Europe, where the national wealth is greater, where private property is more extended, varied, and secure, or where society is more stable and more rich. This is not caused by the excellence of any laws in particular, but by the spirit which pervades the whole legislation of England. The imperfection of certain organs matters nothing, because the whole is instinct with life."—*Society in France* (*tr. by Reeve*), b. ii. c. 16.

Again the same author says: "There is not a country in the world in which, in the days of Blackstone, the great ends of justice were more completely attained than in England, that is to say, no country in which every man, whatever his condition of life—whether he appeared in court as a common individual or a prince—was more sure of being heard, or found in the tribunals of his country better guaranties for the defence of his property, his liberty, and his life." —*Ibid.* note lxvii.

[1] MONTESQUIEU: "The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his own safety. In order to have this liberty, it is requisite that the government be so constituted, that one man need not be afraid of another, ... It is not my business to examine whether the English actually enjoy this liberty or not. It is sufficient for my purpose to observe, that it is established by their laws: and I inquire no further. Neither do I pretend by this to undervalue other governments, nor to say that this extreme political liberty ought to give uneasiness to those who have only a moderate share of it. How should I have such a design—I who think that even the excess of reason is not always

All intelligent citizens can appreciate and even admire the law in most of its details, when these are transacted, one by one, in some signal events of the day; and on such occasions the interest never flags. But in attempting to follow any systematic exposition of it, they encounter at the threshold so many arbitrary distinctions—a method so unreal and incongruous to the business of life—details, exceptions, qualifications, so multifarious and bewildering, that the statesman, the magistrate, the juror, the merchant, and the student alike suffer painful hesitations, and shudders of aversion. The fascination of Blackstone's style carried the general reader through many obstacles with surprising ease, in spite of a method which was indeed the common inheritance of the ages, but which never can commend itself to any but lawyers, and even to them only after familiarity has made it superfluous, and the love of precedent has blinded their eyes to its origin. The author has attempted to take the reader over the same ground by a route altogether different, and always carrying the lamp of the liberty of the subject into every recess

desirable, and that mankind generally find their account better in mediums than in extremes." *Spirit of Laws*, b xi. c. 6.

LORD KEEPER FINCH on the opening of the Long Parliament in 1640, after panegyrising the English constitution, said: "It is glorious in the whole frame; worth your looking upon long, and worth your consideration in every part." 2 *Parl. Hist.* 631.

MILTON says, "No civil government hath been known—no, not the Spartan, not the Roman, though both for this respect so much praised by the wise Polybius—more divinely and harmoniously tuned, more equally balanced, as it were, by the hand and scale of justice, than is the commonwealth of England, where under a free and untutored monarch, the noblest, worthiest, and most prudent men, with full approbation and suffrage of the people, have in their power the supreme and final determination of the highest affairs."—*Ref. in Eng.*

Fox said, "If a stranger wished to learn the constitution of Great Britain, he would seek for it in its laws."—29 *Parl. Hist.* 1378.

examining each leading detail by the light it supplies, and trying, if possible, to mark at each turn, where tradition ends and reason begins[1]—"where freedom broadens slowly down from precedent to precedent."

The present two volumes contain a general introduction to the subject of Law, discussing the current definitions and divisions, as well as subjecting the details to a more natural method than has hitherto been followed. And that Division of the Substantive Law, entituled the *Security of the Person,* is exhibited in complete detail, showing how the law guards personal freedom at every point, and what are the leading changes through which that law has passed. Here will be shown not only all that the law can do to protect the person against every wrongful interference, but also conversely the worst that can be done to the persons of those who occasion such interference—the best and the worst that can happen to the body under the law of England, as that law has been developed up to the present time.

J. P.

GOLDSMITH BUILDING, TEMPLE,
March, 1877.

[1] Any English writer behoves to bear in mind what foreigners are apt to say of him: "Whoever attentively considers the English turn of mind will be struck by a fact of a twofold nature: on one side good sense and practical ability; on the other, the absence of general ideas and elevation of mind on purely theoretical questions. Whether we turn to works on history or jurisprudence, or any other subject, we rarely find that the great, the fundamental cause of things has been investigated."—*Guizot, Eur. Civ.* lect. 14.

CONCISE OUTLINE OF SUBJECTS.

THE LIBERTY OF THE SUBJECT.

INTROD.—CHAP. I. DISCUSSION OF THE CURRENT DEFINITIONS AND DIVISIONS OF THE LAW.—Municipal Law—Modes of treating Law —Definitions of Law Ancient and Modern—A New Definition — Divisions of Law, Ancient and Modern—A New Tenfold Division of Law.

INTROD.—CHAP. II. DISCUSSION OF OTHER DIVISIONS, TERMS, AND PHRASES USED IN THE LAW.—Liberty of the Subject—Civil Liberty—Origin of Government—Social Contract—Constitutional Law—Public and Private Law—Civil and Criminal Law—Law of Nations—Law of Nature—Divine Law—Feudal Law—Civil Law—Canon Law—Common and Statute Law—Judge-made Law—Fictions—Precedents—Knowledge of Law—Law and Equity—Codification—Meaning of Right, Duty, Obligation, Wrong, Tort, Crime, Felony, &c.

THE SECURITY OF THE PERSON.

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CHAP. V. RESTRICTIONS OWING TO COMPULSORY ACTS AND DUTIES STRICTLY PERSONAL.—Sumptuary Laws—Compulsory Services, &c. —Name, Dress, Food, Armour—Service as Soldier, Sailor—Enlistment, Impressment—Compulsory Duties and Offices of Juror, Witness, Sheriff, Municipal Officer, Churchwarden, Overseer Constable, Surveyor of Highways—Slavery.

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INTRODUCTION.

CHAPTER I.

DISCUSSION OF THE DEFINITION AND DIVISION OF THE LAW.

Law in general. Distinction between laws of nature and municipal law.—All writers upon municipal law, who treat the subject methodically, find it necessary in the outset to discriminate between the two leading significations of the word "law" which pervade the languages of all civilised nations. The laws of nature or of natural phenomena are those abstract rules of cause and effect, which the Great Architect has impressed on the external world and its elemental changes. These laws are fixed and immutable, though generally hidden from superficial inquirers. They can only be arrived at by some power of reflection, and in most cases only after a wide induction from careful observations ranging throughout time and space. The innate curiosity of man, springing from the restless desire to better his condition, prompts him to discover these laws; and by their aid he unlocks the secrets of nature, and gratifies his sense of power. By his capacity to reflect, to distinguish, to analyse, and explain, he differs from the lower animals; and brings his knowledge, gathered from many sources, to bear upon each subject, until his mastery over material things is established. And the laws of the mental and moral world are searched for by methods akin to those used for the material world, though by subtler processes and among more volatile elements. When the laws of nature have been thus discovered, the chief aim of

man is to adapt his conduct and operations so as to conform to them, for by such conformity alone can he make them minister to his well-being. And by so acting he can achieve results which, within his own range of influence, are far-reaching and durable. The farther his researches are carried, the more variety of occupation he makes for himself. He attains heights of knowledge and power, and a consciousness of growing civilisation, which are themselves good, and constantly refresh his mental and moral nature, as well as augment his material comfort and happiness.

Municipal law contrasted with laws of nature.—But with municipal laws, or those laws which govern the mutual relations of individuals in communities and nations, the fundamental notion is altogether different. Instead of these being fixed and invariable, and being searched for *ab extra* in external phenomena, instead of their existing altogether independent of man, they are essentially made by man himself. They are devised to meet his own wants; it is not his wants that are accommodated to them. The laws of nature are historical facts,—they point to the past—to the beginning of time, and a Great Architect, whose will alone is the measure and the limit of all knowledge concerning them. On the other hand, the municipal laws are devised by man himself, and devised for no other purpose than to further his own pursuits. They are the creatures of his own necessities. While the laws of nature are searched for because they already exist, the municipal laws exist only from the time when they are fashioned and settled. They vary, and disappear and reappear, and if man were blotted out of the world, they would perish with him. While the laws of nature are indestructible, the laws of man are provisional and temporary, reflecting his passing cares and pursuits—following him as a shadow, and not leading him as if he were a captive. It is not, however, to be supposed, that, though the municipal laws are made by man himself, they necessarily on that account conflict with the laws of God and nature. On the contrary, as will be seen hereafter, the law-maker usually searches for his materials in the storehouse of nature itself, and in the recesses of his own being, both mental and physical. He takes and adapts these to his purpose. But it is only when and

because these are accepted and adopted, that they become part of the municipal law.

In what the laws of nature and municipal laws agree.—But though the laws of nature differ from municipal laws in their origin and relation to man, there is one respect in which they agree, and that is the influence which they exert, directly or indirectly, on the conduct of man in all situations of life. The laws of nature, being divinely appointed, influence man's conduct by making his life all but impossible, unless they are observed and obeyed. They are irresistible, and compel his submission wherever he turns; he cannot escape from them, and yet cannot alter them. The municipal laws, on the other hand, being entirely artificial, are made so as to imitate the laws of nature,[1] but can only exact such a halting obedience as is the fruit of choice rather than of compulsion. They compel, it is true, after a fashion, but not by any direct and immediate action. They operate circuitously through the

[1] Some philosophers have speculated as to whether the notion of municipal law or of the laws of nature comes first in order of time, that is, whether we, having first acquired the notion of a municipal law, afterwards give a like name to the settled order of events which we observe in nature, and call them laws also; or whether, having first acquired the notion of laws of nature from our observation and experience, for example, of the laws of heat, falling bodies, flowing water, &c., we give a like name to the rules which are prescribed to us by third parties. This may be treated as an unsettled speculation; but the better opinion seems to be that the two notions are contemporaneous. Others try to learn something as to the essence of municipal law from the etymology of the word "law" in different languages. Aquinas, Suarez, Valentia, &c., derived the word "law," or *lex*, from *ligo*, to bind; others derive it from *lego*, to read: Cicero derives it from *deligo*, to elect or choose, inasmuch as a law implies a choice of two things. These etymological inquiries may be said to throw no light whatever on the matter.

BURKE thus alludes to this subject: "Surely there cannot be a more pleasing speculation than to trace the advances of men in an attempt to imitate the Supreme Ruler in one of the most glorious of His attributes, and to attend them in the exercise of a prerogative which it is wonderful to find intrusted to the management of so weak a being. In such an inquiry we shall indeed frequently see great instances of this frailty, but at the same time we shall behold such noble efforts of wisdom and equity as seem fully to justify the reasonableness of that extraordinary disposition, by which men in one form or other have been always put under the dominion of creatures like themselves."—*Abr. Eng. Hist.* ch. ix.

reason, and by reaching the springs of human action. Man follows, and is intended to follow them, not because he cannot help it, but because reason itself says it is prudent to obey them. In this one respect both laws agree, namely, in the ultimate result of being followed and attended to, and this common feature binds both kinds of law as species under one genus. The one is intended to be an imitation of the other, not only in its certainty and uniformity, but often also in its origin; for nearly all codes of barbarous nations purport to have a divine origin. This arises, however, only from the artifice of legislators, who, in order to exact from rude communities a readier obedience to municipal laws, find no easier and more effectual means of doing so than by announcing them as the very voice of Heaven.[1] Such an advantage, though invaluable at the starting-point, becomes at a later stage a grievous impediment and drag. For when obedience thus secured has grown with the growth of society, and has become a second nature, it is then too readily deemed an act of impiety to change and improve what has been referred to a superhuman source. Thus a law, though in itself essentially transitory and flexible, and capable of adapting itself to new wants as they arise, becomes stereotyped, and impedes the very movements essential to progress.[2]

[1] PLUTARCH says that Lycurgus, Numa, and other great men, finding their people difficult to manage, and alterations to be made in their several governments, pretended commissions from Heaven, which were salutary at least to those for whom they were invented. —*Plut. Numa.* See further, *post*, Introd. ch. ii.

[2] "Those who will admit of no change in the state would render errors perpetual, and, depriving mankind of the benefits of wisdom, industry, experience, and the right use of reason, oblige all to continue in the miserable barbarity of their ancestors, which suits better with the nature of a wolf than that of a man."—*A. Sidney on Govt.* p. 405.

"It is observed by the best writers on this subject, that those commonwealths have been most durable and perpetual which have often reformed and recomposed themselves according to their first institution and ordinance, for by this means they repair the breaches and counterwork the ordinary and natural effects of time."—*Pym* loq. 3 St. Tr. 342.

Venice in the middle ages prided itself on the irrevocability of its laws, and most of the travellers and historians of the time believed this to be a sure sign of its immortality and of its extraordinary wisdom and insight!—*Thuanus, Hist. Ocean.* 56.

Supposed province of municipal law.—While municipal laws are created by man for his own purposes, it is natural to inquire what those purposes are. This, however, is an obscure and difficult research. Nothing is so closely interwoven with daily life as the law and its rules and restrictions. No human employment is withdrawn from its all-pervading influence, or so remote and isolated that it is not confronted at one stage or another as with an inscription on the wall, "Thus far shalt thou come and no farther." All the businesses of life repose on this essential condition—that there are limits in all directions, created by members of the community, each against each—limits which cannot with safety be overpassed. This sense of restriction haunts all the myriad occupations of man, like a wandering voice. What it is—whence and whither it comes and goes—might well exercise the speculations of philosophers. For society, in all the stages of its progress—in all conditions of time and place—whether loosely cohering in wandering tribes, or built up, tier upon tier, of

HARRINGTON declared that "the republic of Venice would be immortal—a commonwealth having no cause of dissolution, and standing with one thousand years of tranquillity upon her back."—*Harr. Oceana.*

HALE says: "He that thinks that a state can be exactly steered by the same laws in every kind as it was two or three hundred years since, may as well imagine that the clothes that fitted him when he was a child should serve him when he was grown up as a man. The matter changeth the custom: the contracts the commerce: the dispositions, educations, and tempers of men and societies change in a long tract of time, and so must their laws in some measure be changed, or they will not be useful for their state and condition. And besides all this, Time is the wisest thing under heaven."—*Hale's An. of Law.*

"In modern days a condition of stagnation and decline has been the actual condition of many political societies for long periods of time. It is a condition prepared always by ignorance or neglect of some moral or economic laws, and determined by long-continued perseverance in a corresponding course of conduct. Then the laws which have been neglected assert themselves, and the retributions they inflict are indeed tremendous. In the last generation and in our time the Old and New Worlds have each afforded memorable examples of the reign of law over the course of political events. Institutions maintained against the natural progress of society have 'foundered amidst fanatic storms.' Other institutions upheld and cherished against justice and humanity and conscience have yielded only to the scourge of war."—*D. of Argyll's Reign of Law*, 431 (3rd ed.).

closely knit communities—all silently pursuing their complicated occupations—has always had laws of some kind. Many a sage like Socrates, surveying the scenes of the marketplace, must have pondered over the secret why and how so many independent activities can be made to act so harmoniously. It is true that Homer said the Cyclops had no laws and no political constitutions.[1] Herodotus says the same of the Androphages, and yet that they were great breeders of cattle.[2] Historians say that the ancient Romans after the expulsion of their kings had no laws for twenty years, till they sent commissioners to inquire, and these brought them the Twelve Tables. The ancient Abyssinians, ruled by the descendant of the Queen of Sheba, were also said to have had no laws.[3] And travellers have reported of the Caribbeans that they had no laws, and each killed his wife at pleasure.[4] The Iroquois Indians are said to have relied on sentiments of shame, and had no punishments.[5] And we are told that when there was no king in Israel, every man did that which was right in his own eyes.[6] But these sayings do not conflict with the results of universal experience, that all nations and tribes must consciously or unconsciously have laws of some kind, and customs are the laws of barbarians.

Aversion of lawyers to much generalisation.—Yet the range or province of municipal law is a problem which the great thinkers of the world have done little to solve. Nor is the main reason of this far to seek. The municipal law is nothing, if it is not practical, and it cannot be known in its practical details without great and persistent toil. The master spirits of philosophy have shrunk from the irksomeness of penetrating so many petty, devious, and sordid labyrinths, and have passed them by on the other side as naught but a mighty maze without a plan. The votaries of the law, on the other hand, have been so engrossed with details, that they have not cared to apply their minds to theories and systems, which they themselves have found all but useless and unprofitable. They have always gladly cast aside the abstract for the concrete, and have bid

[1] Hom. Odyss. vi. 5; ix. 106; x. 200. [2] Herod. b. 4.
[3] 1 Univ. Hist. [4] 15 Univ. Mod. Hist. 233. [5] 3 Schoolcr. Ind. 184.
[6] Judg. xvii. 6.

farewell for ever to the dreams of science.[1] Between these two classes—the class that had the will but not the means, and the class that had the means but not the will—little care has been expended on arranging and reducing to order so many and multifarious materials.

Whether law is a science.—Hence the difficulty which presents itself of treating municipal law as a science at all, though such a name has been suggested with more and more energy in recent times. It is natural, indeed, that a dignity which is not denied to humbler subjects—to Shells and Insects, to Sound, and Colour, and Heat—should be claimed for the greatest and most potent body of knowledge which concerns the children of men—a knowledge which reaches, directly or indirectly, all stations

[1] HALE said great men usually neglect the study of the English laws.—*Hale's Hist. C.L.* 140.

LORD MANSFIELD said that ignorance on subjects of law was extremely pardonable, since the knowledge of particular laws required a particular study of them; that the greatest genius without such study could no more become master of them, than of Japanese literature without understanding the language of the country.—15 *Parl. Hist.* 900.

BURKE, writing a few years (1757) before *Blackstone's Commentaries* were published, says: "The law has been confined and drawn up into a narrow and inglorious study; an indigested method, and a species of reasoning the very refuse of the schools. Young men were sent away with an incurable, and, if we regard the manner of handling rather than the substance, a very well-founded, disgust."—*Abr. Eng. Hist.* ch. ix.

An acute citizen of the world lately made this comment on English law: "The faults as well as the excellences of the English character arise from that great dislike to generalise which has made us the practical and in many instances the prejudiced people that we are. Abroad, a knowledge of general or natural law, of the foundations on which all laws are or ought to be based, enters, as a matter of course, into a liberal education. In England lawyers themselves disregard this study as useless, or worse than useless. They look, and they look diligently, into English law, such as it is, established by custom, precedent, or Act of Parliament. They know all the nice points and proud formalities on which legal justice rests, or by which it may be eluded. The conflicting cases and opposing opinions which may be brought to bear on an unsound horse or a contested footpath, are deeply pondered over, carefully investigated. But the great edifice of general jurisprudence, though standing on his wayside, is usually passed by the legal traveller with averted eyes; the antiquary and the philosopher indeed may linger there, but the plodding man of business scorns to arrest his steps."—2 *Bulwer's Hist. Char.* 13.

and classes, and challenges the attention of governors and governed alike, searching the roots of social life far and wide. To watch and guide the changing details of the law and direct its next evolutions, is the business of politics, which is the most conspicuous occupation of practical minds. Politicians constantly emulate each other in balancing and forecasting the conditions of this progress—in guiding the centre of motion—in rounding angularities, removing obstacles, levelling up or down, according to the motive forces in the ascendant. But when and why some laws were ever made at all, or, if made, when or why they should not be unmade—when it is best to stop and when to advance—when to speak and when to be silent—when to efface and when to restore or expand—these are secrets which have baffled the scrutiny of all the ages, and the wisest of men can show more easily how little they know of them than how to explain them. When a system of knowledge has no fixed range of action and an ever-shifting foreground—when its principles are little better than changing maxims of expediency—the mere saws and instances of the hour—while its origin and progress are alike desultory, fortuitous, and uncertain—when no person can divine in what direction it is tending, and what are the legitimate limits of its domain—it is almost an abuse of language to call law a science, though it may be the most transcendent of all the arts.[1] The universal influence it wields over the conduct of man in the business of the world entitles it in any case to the first importance. Finch said that the sparks of all the sciences in the world were raked up in its ashes.[2] By

[1] "Jurisprudence, according to the primary and established sense of the word, especially on the Continent, is the science of the Roman law, and is seldom applied to any other positive system, but least of all to the law of nature."—1 *Hallam, Lit. H.* 415.

SIR WILLIAM JONES says:—"The great system of jurisprudence, like that of the universe, consists of many subordinate systems, all of which are connected by nice links and beautiful dependencies, and each of which is reducible to a few plain elements. If law be a science, and really deserve so sublime a name, it must be grounded upon principle, and claim an exalted rank in the empire of reason; but if it be merely an unconnected series of decrees and ordinances, its use may remain, though its dignity may be lessened, and he will become the greatest lawyer who has the greatest natural or artificial memory."

[2] 1 Wynne, Eun. 70.

whatever name it may be called, the law is the great touchstone by which all human affairs are more or less tested, at least as between man and man. And if the present definition of science is too restricted, it may well be extended sufficiently wide to include the eldest born and the natural protector of all the rest.[1]

Law capable of methodical treatment.—But though law can scarcely be viewed as a science, at least in the sense in which that word has been usually applied, it is not the less a system of knowledge capable of being reduced to order, and pre-eminently calling for clear arrangement. Law has not only the whole field of practical life to influence, but it has an army of officers, ministers, and functionaries to work it out, not forgetting a vast array of magistrates and jurors evoked from the crowd to circulate and apportion its most practical lessons. Its influence is brought to bear on difficulties as they arise. The legal profession must be educated, and those of the public, who choose to learn what is so invaluable when learned in time, but what is so costly when learned too late, naturally expect to master without much difficulty what each is

[1] It may be said that law is no more capable of being treated as a science than religion. Both require to deal too closely with the unreflecting, the ignorant, and the simple-hearted (to each and all of whom they must be accessible) to be capable of being reduced to a rigid system of rules, growing out of each other in logical sequence and development. If they could be comprehended only by a rigorous application of thought, like a science, they would shoot over the heads of those whom it is their greatest pride to protect and console.

BURKE finely observes : "And freedom is not a thing that lies hid in abstruse science. It is a blessing and a benefit, not an abstract speculation ; and all the just reasoning that can be had upon it is of so coarse a texture, as perfectly to suit the ordinary capacities of those who are to enjoy and those who are to defend it. Far from any resemblance to those propositions in geometry and metaphysics which admit no medium, but must be true or false in all their latitude, social and civil freedom, like all other things in common life, are variously mixed and modified, enjoyed in very different degrees, and shaped into an infinite diversity of forms, according to the temper and circumstances of every community."—*Burke, Shf. of Bristol.*

"Government is a practical thing made for the happiness of mankind, and not to furnish out a spectacle of uniformity to gratify the schemes of visionary philosophers."—*Ibid.*

assumed already to know. What is to be learned can best be learned by reducing all that can be reduced to first principles, by arranging subjects in their natural and most intelligible order, and explaining what is pre-eminently addressed to the reason of all by adducing the best reasons that have been given by sages of all times, or if none have been or can be given, then by admitting this defect without yielding to an abject credulity. Law differs from other arts and systems of knowledge in anything but this, that it is most readily learned and mastered when the method and the arrangement are the best attainable. At the same time, none of the other learned professions treats with such unconquerable repugnance all attempts to generalise too much. To insist, as some teachers have done, on mapping out the whole field of human knowledge as a preliminary condition to mastering an empirical system, or even to tarry long in marshalling with nice precision its true place in the array of the arts and sciences, demands too great a reach of abstraction. Far-reaching reflection is doubly odious to those whose affairs are always urgent, who have only time to snatch an instant solution from the readiest judge sitting at the gate, who care little for formulas and methods, and everything for results. The details of practical law—and there is no other law zealously pursued—are already too great to allow time to ponder over the ultimate axioms and postulates, which scientific minds have by severe analysis found buried fathoms deep in its crude materials. A subject which requires the study of a lifetime, so that the longest liver is almost always the wisest lawyer, does not tolerate a lengthened preamble. Yet in spite of all this rooted aversion to first principles, no one can doubt that a large chapter of knowledge, professedly addressed to the reason of practical men, and which assumes to punish them for not knowing and not attending to it, and which moreover it is the pride of the leaders of society to be constantly engaged in amending and improving, must be susceptible of such a method, of such illustrations and explanations as will effectually fix the attention and memory. All other branches of human knowledge readily yield to this treatment. If law, apart from the mere technicalities inseparable from its daily manipulation and workmanship, cannot be made intelligible,

and arrange itself in the mind as the mirror, or at least the semblance of practical reason, it must be the fault of those who profess to explain it. This much is self-evident, that unless thoroughly understood and cordially accepted in all its cardinal doctrines, it cannot be wholly obeyed; and if it is not capable of being obeyed it must be a delusion and a snare, invented to harass and mock the natural craving for superior knowledge, which in civilised communities is a possession so highly prized.

Methods of explaining law.—In entering upon the threshold of the subject, there are two courses open to him who seeks to make the law most easily understood. One is to trace historically from small beginnings in the rudest ages the growth of those rules and canons which ultimately take shape and consistence among all advanced communities. The other is to take the law as found in its highest development in a civilised nation and resolve it into its ultimate elements or factors, bearing in mind that practical knowledge begins where philosophy ends. While some things are too intricate for ordinary observers, the theories of the wise must often be assumed as the starting-point for those, who so soon become engrossed in the busy round of life.

The historical method of treating law.—Law of savages.—Patriarchal origin of law.—The historical method, though seldom systematically followed up, is well calculated to arrest the attention and to yield abundant materials to interest and attract. During the last century or more travellers have added much to our knowledge of some rudimentary conditions of the human race. Many curious particulars as to the habits of tribes living far below the lowest grade of civilisation have been collected, and some insight obtained into their way of thinking, or rather of acting. Some tribes of men are thereby shown to differ scarcely in any respect from the beasts of the field, except in their semblance to the human form divine, and in the higher intelligence which is inseparable from such a form. All the typical features of the fully-developed law are conspicuous by their absence, or rather, by their anti-types. Marriage there is none, but entirely the reverse of it in all its details. Contracts are not needed; crime is neither known nor punished. Individuals have no rights and no

wrongs, distinguished from those of the tribe or clan. Representative institutions, trial by jury, incorruptible judges, habeas corpus, trespass, slander, trade unions, gaols, and workhouses, are abstract ideas far beyond the reach of savage minds, and if uttered to them would be nothing but foolishness. All that corresponds to law in this primæval or degraded state consists in trapping and eating one's adversary. All commerce consists in satisfying the bodily appetites. All morality, religion, and education consist in sacrifices and war-dances. Hunting and witchcraft may be said to divide between them all that flows from reason; these exercise body and mind alike, and fill up the pauses of appetite. It is true that tribes are also found in many quarters of the world only a little higher in advancement, others again higher and higher, until some of the lineaments of those institutions usual in a settled and populous community are discerned. These glimpses of human progress in various stages may be found in the pictured pages of travellers and historians. But notwithstanding all their scattered lights, it is impossible to construct any intelligible history of how the law came to expand into its present full development, what conditions supplied the impulse and directed the growth. Sir Robert Filmer tried to frame a theory of government by tracing society from Adam and Eve to the seventeenth century. He steadily searched for, and always contrived to find, the patriarchal system embodied in every stage—the divine right for the kings, and the passive obedience for the subjects. But Locke had little difficulty in exposing the flaws, assumptions, and self-contradictions manifold, which were conspicuous in his specious chain of deduction. And most authors since those days have rested content with occasional glimpses of old-world ideas visible in ancient codes and histories, but with many a chasm of darkness between. The historical method fails chiefly in its history. It fails to tell whether the savage state is the first state or the last —the starting-point of all, or the falling away and lowest degradation of the many. It solves none of the secrets when, how, or by what subtle influences the noble savage of the woods was transfigured into the peaceful citizen—how the spear became a ploughshare, and the vengeful and murderous blow became a warfare of words transacted by

third parties on a stage—how most of the complicated wants of man came to be satisfied by some appropriate remedy, or quieted altogether by the knowledge that no remedy at all can be found.

The analytical method of explaining law.—The analytical method is the other means of studying and seeking some mastery of the law. To resolve the main processes and machinery of the law into the elementary principles and axioms, is to suggest at once the best division of details, and to supply the best clue to the knowledge of what is, and to the secret of what ought to be. The law is always transforming and expanding itself by a process analogous to the growth of a tree. It is seen among savage tribes as a seed or root or a sapling, and after the lapse of ages it is the pride of the forest. The root has gradually accommodated itself to the soil and searched in all directions for support, and according to the soil so is the tree and the branches. The leaves and branches and trunk have changed, and yet the identity has remained. But why the root has travelled more in one direction than another—why the branches lie more to the east or the west—why they take this shape or that, and finally why one soil is more kindly than another, are secrets too deep for the scrutiny of ordinary men. Yet it is something to know what is the interior mechanism of the tree—the circulation of the sap—the organic structure of the wood, the bark, the leaves, and the roots, the chemistry of the soil—the mutual relations of the constituent members. Analysis can only carry us a few stages, and none can wholly explain why one nation has a more favourable soil than another, and why the tree is here and there of a statelier growth. Human nature serves as common ground, but patriotism and national vanity cover it over with flowers and leaves of mantling green. The variety of soils and situations, however, can scarcely fail to suggest comparisons, reflections, and researches; and as no system of law has yet approached perfection, and the best seems the busiest in searching out still better principles, better processes, and better ends and aims, it must be invaluable to resort to some common classification and some standard of advancement, round which these can be grouped for common reference. Such advantages are those which analysis alone can supply.

General definitions of law by various writers.—Such being a general survey of the bearings of the municipal law, it is necessary to approach nearer, and inquire what definition of the word has been arrived at by the great writers of ancient and modern times. And at this stage it is salutary to reflect that it may be altogether impossible to give any definition at all, for however common may be the experience which each individual almost necessarily acquires of some of the processes of the law daily going on around him, he may yet be wholly unable to fix its generic and specific rank with scientific exactness. Nor is there much to surprise in this state of things, for notwithstanding the researches and the reflections of many centuries, the philosophers cannot be said to have yet settled among themselves how to define truth, beauty, virtue, conscience. Yet every one will admit that each of these is not only an existing thing, but familiar to his thoughts and feelings, however difficult to express their discriminating qualities.[1] It would be

[1] In considering the scientific value of definitions, it should be recollected that the sense of satisfaction derived from a definition, or from the best reason to be given for a doctrine or rule, is not always proportioned to the increase of information or insight afforded. The mathematicians, in expositions of their science, have not shrunk from an endeavour to explain why it is that a body to which motion is communicated moves in a straight line. Thus POISSON, in his "Mecanique Celeste," P. ii., p. 1, § 113, says that the reason is that "no reason can be stated why a body should not move in a straight line." And this, though a merely negative reason, satisfies the mind, and at least takes the edge off further inquiry. Probably on similar grounds it is that amid all the many definitions of virtue which the moralists of all times have been busy in constructing, demolishing, refining away, and canvassing, there is a soothing satisfaction left in the mind by that much-abused yet irrepressible definition given by many, that virtue is nothing else than "the eternal fitness of things." Few persons can avoid ringing changes on this old idea. It is a singular coincidence that BENTHAM unconsciously follows the mathematicians in his explanation of the essential equality of the law. He says, "No reason can be assigned why the law should seek to give one man more than another." -1 *Benth. W.*, 302.

Thus CICERO well expresses what many of his successors have only repeated in language slightly different: "The impulse which directs to right conduct and deters from crime, is not only older than the ages of nations and cities, but coeval with that Divine Being who sees and rules both heaven and earth. Nor did Tarquin less violate that eternal law, though in his reign there might have been no

impossible to collect all the attempts made in different ages to fix the meaning of municipal law, and possibly many of these only end where they began, and substitute a synonym or a circuity of many words for two or three. Some authors resort to the language of eulogy, and avoiding close inspection or distracting details, dilate only on its gilded exterior and most conspicuous features.

Hooker, Burke, Dr. Johnson, Mackintosh, on law.— Hooker eloquently says that "law has its seat in the bosom of God—has a voice, which is the harmony of the world— the least feel her care and the greatest are not exempted from her power, and angels, men, and creatures admire her as the mother of their peace and joy." Such an account indeed must often have astonished those who thought they had reason to know best, and to feel strongly how many terrestrial infirmities clung to the most admired justice. Burke also extolled law as the pride of the human intellect and the collected reason of ages; Dr. Johnson looked upon it as displaying the greatest powers of the understanding; and Mackintosh viewed the progress of jurisprudence as the noblest of spectacles, in which, during the long course of ages, cases of difficulty were gradually withdrawn from brutal force and arbitrary discretion, and subjected to inflexible rules. Hallam also carefully avoided committing himself to any attempts to fix the area of law. Eulogies such as these, bestowed on their familiar work, lawyers would scarcely dare to think or speak; but, when volunteered by bystanders, may well be welcomed and cherished with pride.[1]

written law at Rome against such violence, for the principle that impels us to right conduct and warns us against guilt, springs out of the nature of things. It did not begin to be law when it was first written, but when it originated, and it is coeval with the Divine Mind itself."—*Cic. De Leg.*

[1] Hooker, Eccl. Pol. b. i.—HALLAM has observed that Hooker's description of law is in substance the same as the definition of Eternal Law by Suarez. But the criticism seems unjust to Hooker, whose originality and eloquence cannot suffer by the coincidence.—SIR J. MACKINTOSH says that Hooker referred to "the law of nature." —*Mack. Disc. L. of Nations.* What is meant by the law of nature is afterwards discussed.—See Introd. ch. ii. *post.*

HALLAM has said that "no systematic science, whether by the name of jurisprudence or legislation, can be laid down as to the principles

Definitions of law by the ancients.—Definitions in law can scarcely be said to be favourites, and they are sometimes pointed out as signals for caution.[1] Yet the search is enticing, and it may be useful to see what great authorities have suggested as a definition of municipal law. The ancient codes were too practical, and their legislators too much in earnest, to trouble themselves about this requirement, the desire of later and more critical ages. The Indian codes, those of Persia, of Moses, the older Greeks and Romans, contain no attempt either to define or to make a division of the law. And many of the philosophers approach, rather than grapple with, the same subject. Socrates seemed to think the distinguishing characteristic of law was that it was dependent, not on caprice, but on the will of the gods, was unchangeable, and yet adapted to all conditions of humanity. Plato thought it was the enforcement of the three primary virtues—knowledge, fortitude, and temperance—and that without laws we should live like beasts.[2] Epicurus said without laws men would devour one another.[3] Aristotle thought law was a declaration emanating from the common consent of the community as to everything we ought to do, and as

which ought to determine the institutions of all nations, or, in other words, the laws of each separate community cannot be regulated by any universal standard in matters not depending upon eternal justice."—2 *Hall. Lit. Eur.* 586 (3 ed.). "Law has been studied in general rather as an art than a science."—2 *Hall. Mid. Ag.* 342 (12 ed.).

[1] SWINBURN says: "Definitions are said to be dangerous in law." —*Wills and Test.* p. 1, sect. 3. The Roman Digest also noticed the perilous nature of definitions, the defects of which were so easily exposed by others.—*Digest*, b. 50. BURKE said the rights of men are incapable of definition, but are not impossible to be discerned. —*Fr. Rev.*

Yet fallacies in reasoning are in circulation, which have retarded law reform as well as confused the law itself, and which seem to arise from nothing else but a want of any clear definition of law and its province, as for example in copyright, blasphemy, and forfeiture for crime, and other chapters. So late as 1799 Abbott, a lawyer, afterwards Speaker, opposed the abolition of forfeiture in language which would be untenable in the present day.—34 *Parl. Hist.* 1068. Definitions, or attempted definitions, have this negative value, that they quickly expose any confusion of thought in those who use them.

[2] Plato, De Leg. ix. [3] Plutarch.

enjoining one class of actions and forbidding others.[1] And he elsewhere says, it directs every one how to act on all occasions.[2] Demosthenes also more rhetorically described the law as designed to ascertain what was just, honourable, and expedient, and as the invention of Heaven.[3] Cicero, admitting that municipal law often deviated improperly from natural law, said that it was, or ought to be, a certain eternal principle, which governed the entire universe, wisely commanding what was right and prohibiting what was wrong.[4]

Definitions of law in Justinian's Institutes and later foreign writers.—Justinian's Institutes contain no definition of law beyond this, that justice is the constant and perpetual disposition to render every man his due; that jurisprudence is the science of what is just and unjust; and that the precepts of the law are to live honourably, to hurt no one, and to give every man his due.[5] Paul and Ulpian said law was the art of the just and good.[6]

Scarcely one of the succeeding writers is satisfied with the definitions of his predecessors.[7]

[1] Arist. De Civ. cap. 14, sec. 2. Eth. b. v. ch. i. § 11, 12.

[2] Rhet. ad Alex. ch. i.

[3] DEMOSTHENES—"The design and object of the laws is to ascertain what is just, honourable, and expedient, and when that is discovered, it is proclaimed as a general ordinance, equal and impartial to all. This is the origin of law, which for various reasons all are under an obligation to obey, but especially because all law is the invention of Heaven, the resolution of wise men, the correction of every offence, and the general compact of the state: to live in conformity with which is the duty of every individual in society."—*Orat. c. Aristog.* Professor Christian says this definition of Demosthenes' is perfect, and prefers it to Blackstone's.—1 *Bl. Com.* 442 n.

[4] Cic. De Leg. b. 1, 2.

[5] Just. Inst. b. i. tit. 1.

[6] Dig. i. 1, De Just. et Jur. 11 f. Paul. Dig. i. pr. f. Ulp.

[7] AQUINAS—"Law is a certain rule and measure, according to which any agent is led to act or restrained from acting."

SUAREZ—"Law is a certain measure of moral acts, so that when in conformity with it they are morally right, when discordant from it they are wrong."—*Suarez, De Leg.*

MONTESQUIEU—"Laws are the necessary relations resulting from the nature of things."—*De l'Espr.* b. i.

BECCARIA—"Laws are the conditions under which men naturally independent unite themselves in society."—*On Crimes*, ch. 1.

GROTIUS—"Law is a rule of moral actions obliging us to that which is good and commendable."—*De Jure*, b. i. ch. 1.

Definitions of law by English writers.—The definitions of some of the leading ·ancient and foreign writers on this

PUFFENDORFF—"Law is the injunction of him who has a power over those to whom he prescribes."—B. i. ch. 6, § 1.

BARBEYRAC—"Law is the will of a superior sufficiently notified, by which he directs all actions of a certain kind, so that in regard to such actions he either imposes on them a necessity of doing or not doing certain things, or leaves them at liberty to act or not act as they shall judge proper."—*Notes to Grotius*, b. i. ch. 1, § 9.

BURLAMAQUI'S definition is substantially the same as that of Barbeyrac.

KANT—"Civil law is distinguished from moral, inasmuch as the former legislates only with respect to external actions, and provides for the freedom of all by limiting and defining that of individuals. Strict law may be represented as the possibility of a general and reciprocal restraint, harmonising according to universal laws with the liberty of all."

The Scotch writers define law as follows :—

STAIR (1681)—"Law is the dictate of reason, determining every rational being to that which is congruous and convenient for the nature and conditions thereof, and this will extend to the determination of the indifferency of all rational beings. Liberty is the natural faculty to do that which every man pleaseth, unless he be hindered by law or force."—*Stair,* 1, 2, 1.

MACKENZIE—"Law is the science which teaches us to do justice, and justice is a constant and perpetual will and inclination to give every man what is due to him."—*Inst.* tit. 1.

ERSKINE - "Law is the command of a sovereign containing a common rule of life for his subjects, and obliging them to obedience." —*Ersk. Inst.* 1, 1, 2. *Pr.* 1, 1, 1 (1754.)

McDOUALL—"Law is the rule of voluntary actions of rational beings, prescribing what ought to be done or forborne."—*Instit.* 1, 1, 1 (1751).

French authors thus define law :—

"Law is a rule established by an authority, which one is bound to obey."—1 *Duranton, Droit Fr.* § 29. *Rogron, Codes Fr.* Introd. i.

"Law is the rule of those human actions which have for their principle the free exercise of the intelligence and the will."—1 *Toullier, Droit Civ. Fr.* 2.

"Laws are nothing else but the rules of human conduct, and this conduct is nothing else but the steps which a man makes towards his end, and his end is to know and love God."—*Domat, Droit Civ.* ch. 1.

American authors thus define law :—

KENT adopts the definition of Blackstone with a slight omission, for he defines municipal law as "a rule of civil conduct prescribed by the supreme power of a state."— 1 *Kent Com.* 446.

DAGGE—"Law in the genus is that faculty whereby some lawful superior prescribes rules of action, which those in subjection are obliged to perform under certain penalties express or implied." — *Crim. L.* vol. i p. 2.

subject vary much, and if we turn to the law of England as treated by English writers, we find that definitions were almost entirely dispensed with till the time of Blackstone. Glanville, Fleta, and Britton avoid a definition; and all that Bracton says is, that law is a just statute, ordering what is right and honest, and prohibiting the contrary.[1] Fortescue alludes to law as a holy sanction commanding whatever is honourable, and forbidding the contrary;[2] and again "as the bond of right by which a man is constrained to do or to suffer what is just."[3] Coke, the least methodical of all great writers, nowhere defines law; nor does he give any other division of law than that of common law, statute law, and custom.[4] And as he believed that the Star Chamber kept all England quiet, he must obviously have been satisfied with the ancient definitions. It is to be regretted that Bacon's imperial mind was not more closely applied to a definition of the law. He says, however, that the end and scope which laws ought to regard, and to which they should direct their commands and sanctions, is nothing else than that citizens may live happily.[5] In the tract "On the Use of the Law," which is believed not to be Bacon's, the use of the law is said to consist in three things: "first to secure men's persons from death and violence; second, to dispose of the property in their goods and lands; and third, for preservation of their good name from shame and infamy."[6] It is still more unfortunate that Hale gives no definition, though, as will be afterwards stated, he gives an analysis or division of its subjects. Hobbes defines law to be the command of the sovereign power addressed to the subjects, declaring what every one of them may do, and what they must forbear to do.[7]

[1] B. i. ch. 3. [2] De Laud. ch. 3. [3] De Nat. p. i. ch. 30.
[4] Co. Lit. 110 b. 115 b.
[5] Bac. De Augm., Aph. 5. This indeed was only repeating the reasons of Minos: Strabo, b. x. [6] Bac. W. (Spedding.)
[7] HOBBES touches on the subject in several places: "Law was brought into the world for nothing else but to limit the natural liberty of particular men in such manner as they might not hurt, but assist one another, and join together against a common enemy." —*Commonw.* p. ii. ch. xxvi. "In all kinds of actions by the laws pretermitted men have the liberty of doing what their own reasons shall suggest for the most profitable to themselves."—*Ibid.* ch. xxi. "Civil law is to every subject those rules which the commonwealth

Definition of law by Blackstone, Paley, Bentham, Austin.—Blackstone describes the total laws of one nation or community whencesoever derived as the municipal law of that nation. "I call it," he says, "municipal law, in compliance with common speech: for though strictly that expression denotes the particular customs of one single *municipium*, or free town, yet it may with sufficient propriety be applied to any one state or nation which is governed by the same laws and customs. And municipal law, thus understood, is properly defined to be a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."[1]

Paley does not expressly define what he means by municipal law, except in so far as he assumes it to be the same thing as the law of the land, and that again is something that is consistent with the will of God, the will of God being discoverable from the Scriptures and the light of nature, or the calculation of the consequences of particular acts on our individual happiness.[2] But possibly the key to his notion is found in his definition of civil liberty, which, he says, is "the not being restrained by any law but what conduces in a greater degree to the public welfare."[3]

Bentham defines law thus:—"A law is a discourse conceived mostly in general, and always in determinate words, expressive of the will of some person or persons, to whom,

hath commanded him by word, writing, or other sufficient sign of the will to make use of for the distinction of right and wrong, that is to say, of what is contrary, and what is not contrary to the rule."—*Ibid.* ch. xxvi.; see also *Ibid.* pt. iii. ch. xlii. "Law is the command of him or them that have sovereign power given to those that be his or their subjects, publicly and plainly declaring what every one of them may do, and what they must forbear to do."—*Dialog. Law. and Phil.* "Civil laws are nothing else but the commands of him who hath the chief authority in the city for direction of the future actions of the citizens."—*Domin.* ch. vi.

CUMBERLAND, again repeating Minos, said the good of the whole was the standard and aim of all laws.—*De Leg.*

SIR H. FINCH says law is an art of well ordering civil society.—*On Law.*

SHEPPARD: Law is a rule for the governing of civil society to give to every man that which doth belong to him.—*Epitome*, 683.

[1] 1 Bl. Com. 65.

[2] Paley, Mor. Phil. b. ii. ch. iv.; b. iii. p. i. ch. iv.

[3] Paley, Mor. Phil. b. vi. ch. v.

on the occasion and in relation to the subject in question, whether by habit or express engagement, the members of the community to which it is addressed are disposed to pay obedience."[1]

Austin defines law to be "a command which obliges a person or persons to a course of conduct, or a command which obliges a person generally to acts or forbearances of a class. And a command implies a sanction, that is, a power to inflict evil or pain on the party who disobeys."[2]

Summary of the current definitions of law.—It thus appears that the prevailing definition of law amongst English writers, and one which does not, notwithstanding the variety of phraseology, substantially differ from those adopted by Aristotle, Cicero, and leading writers of other nations, is this, that law is "a rule of civil conduct prescribed and enforced by the state"—to which some add the words "commanding what is right and prohibiting what is wrong." The latter words have been objected to as assuming either that what the state commands must always be right, or that, if its commands should be wrong, then they cannot be laws—both of which alternatives are untenable. The amendment of Blackstone's definition which was adopted by Kent, and substantially also by Austin, is thus the standard definition, namely, that "law is a rule of civil conduct prescribed and enforced by the state."

Doubts as to ancient and current definition of law.—At this stage, where we have arrived at the standard definition of law that has been in vogue from the time of Aristotle and Justinian, and accepted by Hale, Blackstone, and Austin, it may be useful to reflect for a moment on some reasons for doubting, whether that definition was likely to have correctly fixed the true function and place of the law in the economy of the world. A correct definition of it could only be arrived at by a comparison of the law of one nation with that of others, as then known, and by a view of the details which usually make up the complex notion of law in each instance. Can it be said that at any epoch of the ancient world, even the most penetrating intellect had before it materials fit for a wise conclusion? The

[1] Chrestom. sect. 8.

[2] Austin, Juris. vol. i. pp. 91, 98 (3rd ed.).

practice of Greece and Rome and the communities flourishing before and around them in the age of Aristotle, Cicero, and Justinian could scarcely shed a true light on this point. The leading ideas that are the glory of the modern law were then wanting, or dimly comprehended. The sacredness of life, the dignity of labour, the toleration, the far-reaching philanthropy and Christian piety, the abhorrence of violence, the sensitiveness to dictation, the diffusion and interchange of thought and opinion, the readiness to consult and to allow a voice and deference to each interest concerned, the security and harmonious movements of the vast populations of the present day—all point to different springs of action, different objects of life, different standards and estimates, different hopes and destinies.

The ancients were misled by the practices going on around them into thinking, that the end and object of law was to enforce the practice of all the virtues, according to their notions of the virtues. Whether the law was moulded in this way by the people and by their tendencies, or the people were moulded by the law—which was the cause, or which the consequence—a false orbit had been assigned to it. The ancients started with the unquestioned axiom, that all mankind are divided into two classes by an immutable distinction of freemen and slaves ; and this alone was sufficient to derange all the other rules and maxims. Their false gods confused the relations of human and divine. The consuming passion to fight and extinguish their enemies, and make this the glory and chief end of life, obscured all other employments. Their views as to marriage, and all that led to and flowed from it, were loose and arbitrary. Their dealings with the poor, the oppressed, the prisoner, and the captive, were pre-eminently marked, at the very least, by want of thought. Liberty of speech was somewhat understood, but toleration, especially in religious belief, was unknown, and the mechanical appliances for that sublimation of free thought, known as the liberty of the press, were altogether wanting. Violence and arbitrary imprisonment were without adequate check, and security was but a dream. Trial by jury, incorruptible judges, rules of evidence and procedure, did not throw their ramparts round the essential functions of life and property. That share in the machinery of government and legislation,

which ministers to us all the enthusiasm and excitement of war, was then feebly attained. The maxims as to taxation and habeas corpus did not stir their passions like a trumpet. They sought to dragoon people into virtue by vexatious restrictions as to what they were to eat and drink, whom they were to entertain, what they were to spend, how they were to dress when living, and how they were to be buried when dead. They can scarcely be blamed indeed for other things still obscure, as, for example, for not appreciating the true principles and bearings of imports and exports, supply and demand, for these still perplex enlightened nations of the present day.[1]

Their sumptuary laws, their persecuting laws, their savage punishments, their arbitrary maxims of government, were imitated and acted on by all European nations till near the eighteenth century, and in some cases much later. Even the insight of Bacon did not save him from following the crowd in thinking these laws necessary.[2] In England the statutes of apparel, of labourers, of provisions, of conformity were the natural sequence and development of the old ideas of legislation hitherto too blindly and unconsciously followed. From all these we have been gradually working backwards, and emancipating ourselves with painful steps and slow.

The Star Chamber, which was the lineal heir of the Areopagus, acted on the ambitious principle that "no wrong or injury, either public or private, can be done, but that it shall be reformed or punished in due course of law."[3] And, though Coke thought the Star Chamber kept all England quiet, its notions of wrong and injury were too monstrous to be tolerated later than the seventeenth century. Raymond said of the Queen's Bench, "Why is it called the *censor morum*, if we cannot punish that which subverts all morality?"[4] And even Lord Mansfield, C. J., so late as 1773, was found taking up and passing on the saying that "what-

[1] The Cumeans were thought the most stupid people of all antiquity for not putting an import duty on corn and merchandise.

[2] Bac. Ess. 15.

[3] Bagg's Case (1616), 6 Coke, 182.

[4] 17 St. Tr. 153. Even the masterly Pym was found saying "it is the end of government that virtue should be cherished, vice suppressed."—*Forster's Pym*, 177. The highest way in which this can be put is, that these are some of the ends of government.

ever is *contra bonos mores et decorum* the principles of our law prohibit, and the king's court, as the general censor and guardian of the public manners, is bound to restrain and punish."[1] But it will be found that, however Aristotelian this language may sound, the fragment of truth behind it shrinks in practice to very small dimensions; and that all that the courts can "punish and restrain" is trifling compared to the abounding wrongs and immoralities which no laws can put down, and which continually outrun all the processes of all the courts known to mankind. We now boast to be as tender of the lives of the lower animals as the ancients were of nine-tenths of the human race. And though there were noble and illustrious examples of antique virtue, our law, as a system of doctrines and maxims, seems to flow mostly from sources coming in the opposite direction, and is the product of far other thoughts, tendencies, and self-restraints. As far as the east is from the west, so far are our standards of life and our familiar instincts from theirs. For these reasons we may pause at the definition of law bequeathed to us by the ancients, and entertain a doubt as to whether from such materials as theirs they could possibly derive a product, such as we can recognise and accept as a fit likeness of what we now deem law to be.[2]

Objections to current standard definition of law.—There are two radical objections to the standard definition of law already referred to. The first is, that law cannot correctly be said to prescribe or command a course of conduct at all. The second objection is, that there is no indication given of

[1] Jones *v.* Randall, Lofft 385.

[2] "The ancients devoted their attention more exclusively to the harmonious development of the individual man as man. The moderns are chiefly solicitous about his comfort, his prosperity, his productiveness. The former looked to virtue: the latter seek for happiness."—*Humboldt's Sphere of Gov.* Introd.

It is singular that a veteran diplomatist of the age of William III. should have spoken of the ancient institutions in the following extravagant terms, however worthy of one of the champions in the "Battle of the Books:" "The ancient political institutions show such a reach of thought, such a depth of wisdom, and such force of genius, as the presumption and flattery itself of our age will hardly pretend to parallel by any of our modern civil institutions."—1 *Temple W.* 498.

the supposed object, which the supreme power has in view in making the law.

Law does not prescribe a course of conduct.—To say that the law lays down or commands a rule or course of conduct is to say, that the law gives positive directions as to almost everything that man does or ought to do, at least as between man and man. A course of conduct includes the great bulk of man's actions—his habitual actions, not his occasional acts—his motives at each stage, and the manner of following these out. And this must be taken to be true of each individual, for the law speaks not to a few, but to all and to each.

But when one considers for a moment the vast variety of things that man undertakes, or is obliged to do—the infinite details of business that pass before him, and the various motives that actuate him—how can it be said with truth that the law commands a course of conduct? The phrase expresses too much or too little. A course of conduct includes all the thoughts, words, and actions of the day; but to give detailed specific directions, even to one individual, as to what he shall think, say, and do, when he shall turn to the right hand, and when to the left hand—when he shall speak, and when he shall be silent—would fill thousands of volumes. If it be said that a course of conduct does not mean all the minute details of each person's conduct, but only the leading outline, still the same objection recurs, for this qualification would only reduce to a tithe, or a hundredth, or a thousandth part of its bulk the vast body of details, which each individual would still require in order to learn even the outlines of his course of conduct. The world indeed could scarcely hold the volumes that such an undertaking of the law would require to be written. The definition of law which describes it as prescribing a course of conduct is thus obviously incorrect. The truth is rather the reverse. The law cares very little indeed as to the course of any man's conduct; it neither undertakes to teach him, nor does it profess to know what his course of conduct is or ought to be. It prescribes nothing positive at all in the principal heads; what it says is only negative. It does not command; it only prohibits. It gives no positive directions either of morality, religion, justice, or good feeling. It merely restrains the actions of individuals in a few out of the

variety of his occupations, and points out a formal mode of carrying out a few others. The law finds man in possession of appetites, passions, desires, tendencies, which seek their several objects in an infinite variety of ways, and over a boundless area. And it is only a very small and insignificant part of the actions done in pursuit of these objects, that the law cares to know or concerns itself about. All that the law does in its substantive provisions is to restrain. It commands nothing except in the subsidiary machinery. It restrains only a few things. Like the good demon that attended Socrates, it may prevent one going wrong, but cannot prompt one to do right. It does not teach a man what to do, but only what to avoid, or how to accomplish a few things in a formal way. It does not supply the motive power or dictate the course of the journey: it only erects a finger-post here and there. To say then that the law prescribes or enforces a course of conduct, is as nearly as possible the converse of what it professes to do. An individual may do all that the law requires, or rather avoid all that the law prohibits, and yet if he knew nothing but what the law told him, he could scarcely survive a week. The great majority of the actions of each individual proceed from motives far beyond the reach of the law, and such as the law can neither give nor take away. The definition of law by Blackstone and Austin surveys the law from the wrong side.

Another objection to current definition—it assigns no specific purpose to law.—Another radical objection to the current definition of law is, that such definition does not indicate at all what is the great and essential object which all laws propose, or rather which the legislature proposes to accomplish by and through such laws. It is one thing to command without reasons given, and another thing to command with reasons given—one thing to conquer the will, and another thing to lead captive the reason. Blind and passive obedience is only for slaves. Laws in a civilised community are addressed to human beings endowed with reason, conscious of freedom and power, and the pleasures of discretion and choice, having the capacity to reflect, to judge, and to feel. The virtue of laws now depends almost entirely on the assent and consent with which those to whom they are addressed discern and confess their necessity,

and appreciate their full measure and tendency. It may be difficult, if not impossible, to explain many obscurities as to the origin, necessity, and final cause of all laws. None of the great thinkers of the world has yet succeeded in defining their tendency, scope, and ultimate destination, or to lay down any settled rules as to the bounds of their interference with the pursuits of individuals or classes of men. But in this inquiry two things are to be distinguished. All laws may have one generic object, and yet there may be various ways of accomplishing that object, both as regards the subject-matter to be affected and the mode of affecting that subject-matter. The aim may be one and indivisible, and the ways of reaching it manifold. It may be possible to define the former, and not the latter. But the current definition states neither. What the course of conduct enforced by the supreme power relates to—what object is to be attained thereby, or why it is to be attained, is not stated. The definition merely speaks of something being enforced—it speaks of a blind obedience, without indicating why that obedience is exacted, what good it is to do, and what length it goes or ought to go; and in this vital, essential element the current definition of law is conspicuously defective.

A new definition of municipal law.—These two radical objections to the current definition of law naturally give rise to the demand for one that will be free from such objections, if, indeed, any such can be found. Such a definition seems to be this :—" Law is the sum of the varied " restrictions on the actions of each individual, which the " supreme power of the state enforces, in order that all its " members may follow their occupations with greater " security."

This definition, instead of representing the body of law as consisting of a course of conduct, confines the attention to the more limited purpose of controlling some only of the actions of men, either directly by restraining these, or indirectly by defining forms for giving greater effect to them, and that not entirely by way of positive command, but mainly by way of negative prohibition. It also points to the general purpose kept in view by the supreme legislative power. It does not indeed necessarily imply that that purpose is secured by the right means. It merely

states the object which is always professed, or is that which alone can be legitimately professed. The object may not be in fact attained, or it may be attained or sought to be attained by the wrong means. The means, however, which are used, and the subject-matter as to which restrictions are imposed, cannot be exactly stated or even indicated, for the simple reason that no human sagacity or acuteness has yet defined how far these restrictions may or ought to go in the further development of modern civilisation. It is the main business of politics to discuss and find a solution for each particular exigency. It is enough that the law proposes well, and does its best for the time being to decide what will most effectively secure the general good.

In order, however, to explain fully this definition, it will be necessary to examine more minutely its several parts.

Law is a restriction on human actions.—That law is the sum of the varied restrictions upon the actions of each individual, is the fundamental conception underlying its whole structure. Those writers who define law to be a course of action or of conduct lose sight of the manifest truth, that while the course of conduct consists of the whole acts and deeds of men, these spring from so many sources, that it would be idle to say that the law directed them, or even a thousandth part of them. Those sources are far too deep and subtle for any law to intercept or suppress, to guide, or even to watch. Men would go on satisfying their hunger, gratifying their feelings, desires, and passions, amassing and squandering property, bargaining, quarrelling, and domineering over each other, just the same if there were no laws at all. And though the particular details of the law, when such are enacted, influence greatly the general happiness, yet this good is not effected by any radical or material change which they produce in the conduct of men. The mass of men's actions remains the same whatever the laws may be. It is only in the skill with which one restriction is directed here and another there, and in the skill with which the superficial tendencies of human actions are balanced and played off one against another, that the total result becomes beneficial. That result moreover is the fruit of reason and reflection, and does not immediately flow from anything

the law can do. The law affects human conduct by and through the reason. To trace all the secret springs which render law suitable to the circumstances of a people, and which invigorate instead of harassing their multifarious energies and occupations, has been the theme of many disquisitions of curious inquirers. It is, however, too remote from our business, and it may be left in the hands of the legislators, whose occupation it is to discover what would be good laws and what would be bad laws before it is resolved to enact them, or what to preserve and what to amend of those that have already been enacted. It may for our present purpose be assumed that each individual carries within his own breast some standard, by which he can readily appraise their value and test by experience what is just and what is unjust. Mankind have, as Cicero observed, a genius for law. The vast populations of to-day are controlled by very few courts and judges. They gravitate towards law as if towards the inevitable. The common sense of mankind is thus often a better gauge than all the theories of the learned or the decrees of the powerful, as to where the law should begin and where it should end. But whether a law is good or bad, it acts mainly by way of restriction on some of the tendencies of men. The law prohibits each individual from murdering or assaulting or imprisoning his neighbour, from seizing another's property, from marrying certain persons, or more than one at a time, from breaking his contract, from slandering another's character, from interfering with another's mode of worship.[1] But it cannot be supposed

[1] "Laws, whether founded on a right or a wrong exercise of reason, are always intended to act as restraints on the actions of individuals and to interfere with the motives by which their conduct would be otherwise determined. This restraint may be said to be artificial, as opposed to the natural restraints of the individual reason: and this perhaps is the distinction most generally intended when the natural conduct of men is contrasted with their conduct under the control of positive institutions. But as the motives which determine individual conduct are not always reasonable motives, so it is clear that what men naturally do is no sure test either of what they ought to do, or of what they ought to be allowed to do. It is their nature under certain conditions to do all that is bad and injurious to themselves and others. Hence it is the most difficult of all problems in the science of government to determine, when, where, and how it is wise to interfere by the authority of law with the motives which

that it is the law that creates just enough of motive and passion to lead to each lawful human action, or that if there were no law, all those motives and passions would be extinguished. On the contrary, all that is positive in the motives and tendencies existed before law began, and will outlive all the changes that the law will ever cause. The law confronts the irrepressible instincts and tendencies, and confesses that it can cope with them only circuitously through the medium of the understanding. It merely prunes the exuberant foliage, docks the towering branches, guides the roots to the one side or the other. The roots, the trunk, and the branches flourish as before; the individual identity continues, though the motive power and the intricate organisation are prevented from being mischievous to society.

The source of much of the confusion on this subject is traceable to Aristotle, who thought that law positively

are usually called the natural motives of men. The question is no other than this—How far the abuse of those motives can be checked and resisted by that public authority whose duty and function it is to place itself above the influences which in individual men overpower the voice of reason and of conscience."—*D. of Argyll's Reign of Law*, 866 (3rd ed.).

ADAM SMITH says: "Mere justice is upon most occasions but a negative virtue, and only hinders us from hurting our neighbours. We may often fulfil all the rules of justice by sitting still and doing nothing."—*Smith's Theory*, p. 2, § 2.

DR. JOHNSON also had a clear notion of this truth. He said: "The primary notion of law is restraint in the exercise of natural right." 1 *Bosw. Johns.* 38. And again: "Political liberty is good only so far as it produces private liberty."—3 *Bosw. Johns.* 53.

BENTHAM says the principal function of government is to protect individuals from suffering.—1 *Benth. W.* 301.

GUIZOT says a civil government in its code comprehends only those actions morally culpable and socially dangerous.—*Guizot Civ. Eur.* Lec. 15.

WINDHAM (H.C. 1809, 14 Parl. Deb. 1031) said "Laws were almost universally restrictive. They restrained acts which were injurious to the community, and were such, moreover, as could be defined."

The same idea is noticed by ST. PAUL: "The law was not made for the righteous, but for the unruly and the disobedient."—1 *Tim.* i. 9; *Pet.* 1. ii. 9.

DE LOLME was surprised in his keen researches at not finding any English statute enacting the liberty of the press, till he began at last to reflect that it existed simply because it was not forbidden.—*De Lolme on the Const.*

prescribed all the virtues. He says: "The law directs the performance of brave acts, such as standing at one's post, neither fleeing nor throwing away one's arms—also acts of temperance, such as not committing adultery or violence—also acts of moderation, as neither assaulting nor abusing others. And in like manner with the virtues and vices, it enjoins one class of actions and forbids others. As the proverb says, In justice all virtue is comprehended."[1] He also says, "Whatever the law does not command it forbids."[2] The Roman maxim was the reverse, and nearer the truth, namely, that what the law does not forbid it permits. The correct maxim, however, is, that, what the law does not forbid, it leaves each to do or not to do as he pleases, and altogether declines to know or care anything about the decision he may come to.[3]

Law includes forms for giving effect to some human actions.—But in defining all laws as in the nature of restrictions, there is still something to be added. A distinction is necessary between those laws which are primary and those which are secondary and subsidiary. Some laws are merely modes of carrying out the principle contained in other laws. The principle is always to be distinguished from the machinery necessary to work it out. A survey of the laws discloses, that a partial restriction only is imposed in many cases, and that an exception is allowed, which is declared to be the only legal mode of giving effect to the human tendency restrained. For example, when it is once determined to restrain the tendency to marry, it is found not to be enough to prohibit marriage with certain individuals, but a form is given by which marriage, even when not prohibited, is to be carried out, in order to define with greater certainty who are and

[1] Arist. Eth. b. v. ch. i., § 11, 12. [2] Ibid. b. v. ch. xi.

[3] "The ancient commonwealths and philosophers countenanced the regulation of every part of private conduct by public authority. on the ground that the state had a deep interest in the whole bodily and mental discipline of every one of its citizens—a mode of thinking which may have been admissible in small republics, surrounded by powerful enemies, in constant peril of being subverted by foreign attack or internal commotion, and to which even a short interval of relaxed energy and self-command might so easily be fatal, that they could not afford to wait for the salutary permanent effects of freedom."—*J. S Mill, On Lib.* 23.

who are not married, as a guide to those whom such knowledge affects in one way or another. While buying and selling, giving and bequeathing, are prohibited in some cases altogether, it is yet found expedient to provide a form, or something approaching a form, according to which certain contracts, wills, and solemn acts, which are not otherwise interfered with, must be carried out, before the law will regard these as effective and binding. Moreover, in those parts of the law which will be found to be subsidiary, and to consist merely in machinery for giving effect to the primary laws, such parts consist of forms which must be followed in order to attain more quickly and easily certain objects. Thus in the departments of legislative, judicial, and executive law many of the details consist of formal steps for passing new laws, for electing members of the legislature, for executing sentences and orders of courts of law. The forms thus incorporated into the law are the only parts which can be correctly described as positive law. They are, at most, a small part of the law, and are more or less subordinate and auxiliary to the primary or substantive laws, all of which, as already stated, are merely restrictions on the acts of man, and the forms themselves are only another name for restrictions, for without them mankind would choose many concurrent ways to the same end.

Part of definition—that law is enforced by the supreme power of the state.—The laws consist not merely of restrictions, but it is an essential characteristic, that these should be enforced by the supreme power of the state. Who or what then is the supreme power of the state? If one surveys mankind from China to Peru, it will be obvious that the supreme power of a state assumes various forms. There may be a republic, or there may be a monarchy, or some of the many intermediate organisations made up of various elements common to both; and the permutations of these elements are so various that the resultant force can scarcely be described, except by comparing and contrasting the leading characteristics of other like forces. Whatever be the structure composed out of so many materials, the supreme power is only a synonym for that human voice which cannot be resisted by any one individual or by any minor combination of them short of the majority; for whenever

one resists it, all the other individuals readily combine consciously or unconsciously to uphold it. Each individual is thus crushed in detail, and the aggregate power of all the individuals who live in one community thus becomes a continuous, and it may be indefinable, source of power, which carries all before it. An irresistible power, reigning absolute over all the individuals in the state, must arrogate or exercise all the means of enforcing or compelling each individual to act—so far at least as any one can be said to be compellable by the superior force of all the rest. When a number of individuals within a defined area are all living subject to and acknowledging one common law, which is the emanation of one supreme power, or is adopted by it—when such laws are made without the dictation of any persons living without the area—when all the difficulties that can arise between the individuals are solved by means found within the same area and irrespectively of any power or dominion elsewhere—then all may be said to be living in one separate and independent self-governing state. The supreme power is merely the organ of the entirety of individuals so living together, and it is of necessity designed and known to be irresistible and inevitable.[1] Life in society is impossible without such mutual relations and such a common bond. Each individual must obey such laws whatever they may be. That there must be a supreme power in every state or in every self-dependent community, is an axiom which cannot be explained, but which must nevertheless be assumed. The whole current and complexion of human faculties and tendencies lead irresistibly to this settled condition of social life. All human affairs gravitate to it. Even in the rudest forms of states, there is a similar power, whether lodged in the patriarch or the elders of the tribe, and it is usually found to assume by turns a legislative, a judicial, and an executive phase. All men, consciously or unconsciously, restrain themselves in presence of it and accept its arbitrament as final and irreversible. Whenever

[1] AUSTIN defines a sovereign to be "a determinate human superior not in the habit of obedience to a like superior who receives habitual obedience from the bulk of a given society, and such society is deemed a political and independent society, and their mutual relation is that of sovereign and subject."—1 *Aust. Jur.* 170.

two or three individuals are gathered together in circumstances, however isolated and abnormal, the relation of superior and subject is evolved. Submission or war to the knife is the substratum of all human companionships. Such an alternative as this always presents itself to each, and confronts him at all the leading turns. As man, however, has a genius for law, he seldom hesitates to submit to a governor. There is nothing irksome in his homage, which is as natural as it is useful. In more complex conditions this sovereign power may be distributed among several individuals according to nice and delicate gradations. But whatever be its form, and whencesoever traced, and by whomsoever assumed or usurped, it is able and ready to enforce its will. For every lord who strikes the earth with his foot, a thousand willing vassals start up. Which is the cause and which is the consequence, no philosopher has yet been able to discover. The relation of governor and governed is a ready-made constituent of human life.[1] The governor is irresistible, and all men are born to accommodate themselves to the irresistible; the governed are sanguine and faithful, and all men admit that they are the better for being governed, even if the governor is irresistible and peremptory. It is only after long familiarity, that each of these classes begins to reflect why the other was made, and whether that other could not be improved.

Part of definition, that laws must be enforced, and how.—But when a supreme power has been found in the

[1] ARISTOTLE remarked that by nature some beings command and others obey for the sake of mutual safety, for a being endowed with discernment and forethought is by nature the superior and governor. —*Arist. Pol.* b. i. ch. ii. This seems the same idea as was afterwards repeated by Cicero, that man has a genius for law.

POMPEY said he had only to stamp the ground of Italy, and an army would appear.—*Plut. Pomp.*

It requires only a few courts and judges to dispose of all the litigation of millions of people; and if a handful of men were perversely to do the reverse of what the majority do almost instinctively, these men could give full occupation to all the courts of the country in disposing of the business they alone could thereby create.

If the idea of the ancients that law commands a course of action were efficiently and thoroughly acted on, half of the human race would require to be judges and bailiffs.

state able and ready to enforce the law, it is next necessary to explain what is meant by this "enforcing of the law." It is unnecessary to enter into the subtle and recondite inquiries as to the nature and operations of the will. It is enough for all practical purposes to assume and know that the law is addressed to the reason, and seeks to influence human actions solely by and through the will—and by presenting an alternative by way of sanction to each prohibited act. Such alternative is not intended as an end, but solely as a means. It is so contrived as, in the minds of the great majority, to overbalance its counterweight. The fear of worse is that which reacts on the mind, and so induces the act which the law approves.[1] It is a sanction rather than a selected alternative, because the supreme power is by no means indifferent which of the two alternatives shall be chosen. On the contrary, the one is intended to be chosen, and the other is put forward as that which the law dislikes, and only presents as an unwelcome substitute. The mode in which the alternative or sanction influences the will is by causing pain to the body or pain to the mind. The pain to the body consists of imprisoning, beating, or killing it. Pain to the mind consists of forcibly depriving the individual of part of his property. Conjoined with both is the degradation which society instinctively associates with disobedience to the irresistible. Thus when the law declares that a man shall not murder, or steal, or commit perjury, there is no physical barrier created to his committing these acts so restrained. On the contrary, he has it in his power to commit them, but as reason teaches him that the inevitable consequence will be some punishment to the body or mind, his intelligence, fortified by other instincts, leads him to avoid what he is inclined to as the only way of not being subjected to the punishment. When he so makes his choice, the object of the law is achieved. Again, when one man owes another money, he is not physically compelled to pay it, but if he do not pay voluntarily, he knows that his property will be

[1] Gundling in the beginning, and Adam Smith in the latter half, of the eighteenth century, prominently brought out this characteristic of the law, that it comprised those virtues only which were enforced, or the violation of which was visited with some kind of external suffering.

taken from him compulsorily, in order to bring about circuitously the result he is not inclined to. The foreknowledge of this disagreeable seizure of his property overcomes his reluctance to do what is desired, and when he makes his election and pays the debt, the law has achieved all it professes or expects.[1]

Such is the effect produced on the will of each individual by the law. The law does not attempt to enforce specific physical performance of any legal duty or obligation. It merely addresses to the understanding of each individual, who fails to perform what is expected, the admonition, that a disagreeable alternative is ready to overtake him; and the knowledge of this inevitable sequel is that, which by reflex influence induces the individual to do what the law requires. This species of reflex influence is all that is meant by saying that the law enforces the restriction, and shuts out some act to which the individual may otherwise be prone. More than thus appealing to the reason and presenting an alternative the law cannot do.[2]

[1] "There are in the mind of man, as there are in nature, certain forces originally implanted which are unchangeable in this sense, that they have an invariable tendency to determine conduct in a particular direction. But as in nature we have a power of commanding her elementary forces by the methods of adjustment, so in the realm of mind we can operate on the same principle by setting one motive to counteract another; and by combination among many motives we can influence in a degree, and to an extent as yet unknown, the conduct and the condition of mankind."—*D. of Argyll's Reign of Law*, 408 (3rd ed.).

GUIZOT also says: "It is the true nature of government to manage with dexterity, and to conciliate all the interests and forces of society. The essence of liberty is the simultaneous manifestation of all interests, of all rights, of all forces, and of all social elements."—*Guizot, Civ. Eur.* Lect. 14.

[2] SIR H. S. MAINE, in his "Village Communities," suggests that that part of the current definition of law importing that every law must have a sanction, or be capable of being enforced, fails in its application to the village communities of the East, where nothing analogous can be traced. But it seems a sufficient answer to say that custom or usage, however loose, is the law of barbarians. If any one of the tribe were to deviate from the current usage, the rest of the tribe would expressly or impliedly meet and pass sentence on the innovator, and without formal trial, would with one consent spear or drown, or otherwise dispose of him. In so acting they annex a sanction or command to each custom quite as effectually as if the punishment for disobedience were written in a code. Birds and various

There is and can be no specific performance of legal duties except in a vague and figurative sense. The individual may be guided, as a horse may be led to the water to drink, but it requires something over and above what the law can directly reach to give the finishing touch. All the artillery of the greatest empire in the world, with its whole fire concentrated to one unerring doom, cannot make its meanest peasant say yes or no. His body may be shattered and annihilated, but there is still something that cannot be conquered. This consciousness of the limited power of the law is that which teaches, that, in order that laws may be obeyed, they must be addressed to the reason and must command the assent of all reasonable minds, otherwise an interminable warfare and an endless harassing of human life will rage to the end of time, and never be appeased.[1]

animals have been noticed in the same way to dispose of "advanced thinkers." Storks have been observed to hold councils of war, and inflict capital punishment on one of the company for some mysterious offence.—*Lee's Anecd. of Birds*, 190.

[1] Much of the history of the law consists of a series of mistakes made by legislators of all ages as to the things they have tried to compel people to do; and the last hundred years seem to have been occupied in the discovery of the mistakes thereby made, and the successive efforts to retreat from false positions, and occupy new positions.

Modern legislatures now acquiesce in the conclusion, that most of the old tasks were impossible, which sought to compel absolute uniformity of thought, of manners, of habits, of social life, of belief, of hiring, of prices, of dress. The attempt to rivet these fetters on the mind, besides being abortive, occupied too much of the time of the courts, and required too many frivolous and purposeless inquiries and failed to withstand the ridicule of the times.

A statute of Henry VIII. went the length of enacting that "all things that concern Almighty God and His religion, ordained by the archbishops, bishops, and doctors, should be fully believed, obeyed, observed, and performed on pains and penalties as if set forth in the act."—32 Hen. VIII. c. 26.

The Court of Chancery used for centuries to imprison persons for not doing some specific act, as executing a deed, putting in an answer, &c., whereas it might have been seen how impotent was the attempt to concuss the mind, and that the court had simply to do the thing itself, or order the suit to proceed as if the thing required was done, and the whole difficulty of trying to compel the impossible would be avoided. It was not till 1830 that a bill was brought in to abolish this purposeless and indiscriminate imprisonment.—22 *Parl. Deb.* (2nd) 375.

So late as 1750, the most powerful court in the world, the

And most of the governments of the world, after centuries of experience, have been made to learn, that laws are made for the benefit of the governed as well as of the governors—and obviously rather more for the benefit of the governed, because they are the more numerous, unless, indeed, all can agree to arrange themselves upon one level, and acknowledge the absolute supremacy of the law without distinction of ranks or mutual relations.

Easiest mode of enforcing law is to allow the subject to share in making law.—Most nations, after exhausting other plans, must sooner or later discover that the surest way to secure ready obedience to the law is to provide means whereby each individual subject can take a part more or less direct in framing and devising the laws he is to obey, for obedience to self-made laws is easy and pleasant, and is congenial to all men in all circumstances and ages. A law, however wise or prudent, if made by one or many acting without consent, consultation, or co-operation of the individual subjects to be governed, has and will always have a certain bitterness altogether irrespective of its merits; and this bitterness recurs, and will recur while society exists. But when laws are the fruit of choice and deliberation, and the joint labour of the

House of Commons, was apparently irritated and dismayed at the discovery, that it could not compel a prisoner at its bar to do so simple a thing as bend his knee and confess his fault if he was minded not to do so. And as all the threats of power were wasted on one prisoner in vain, the House at last admitted its inability to achieve the impossible, and contented itself with imprisoning the refractory culprit a little longer, and then discharging him.—*Re Murray*, 14 *Parl. Hist.* 894. At the same time the House resolved in future not to insist on a condition so easily baffled. And the House of Lords in like manner has confessed the impossibility of enforcing this simple act of kneeling from prisoners at its bar, and no longer insists on it.—*May's Parl. Pr.* 110. In Holland it was said to be once the law, that if the criminal would not admit the justice of his sentence he was pressed to death.—14 *Parl. Hist.* 1066. That practice was no worse than our own law, which was not repealed till 1772, by which a prisoner who stood mute on being arraigned, and would neither plead guilty nor not guilty, was pressed to death.—12 Geo. III. c. 20; 7 & 8 Geo. IV. c. 27, § 2. See *post*, ch. vii.

The legislature has, from similar views, at last ceased to regulate the details of private life by sumptuary laws, has ceased to regulate literature by a censorship, and religion by an inquisition.

governed and the governor, and approach the most nearly to self-made laws on both sides—as all laws do which proceed from a legislature to which the subjects send representatives—this partnership of feeling and of self-interest engages all the prejudices of human nature in its service, and thereby draws after it a willing obedience, and the greatest triumph of civilisation is thereby completely achieved.[1]

The object of law is, that all individuals may follow their occupations with greater security.—It seems at first sight singular, that after the vast experience of mankind in making, unmaking, altering, amending, and rewriting laws, one cannot easily arrive at some definite conclusion as to what the object of all laws is—what they propose to do, and by what means. Yet it is here that the greatest difficulty arises. If all were agreed as to the precise object and the precise means which the law pursues, there would scarcely be room for the mistakes that are made—the heats and dissensions—the evil predictions—the threats, the denunciations—the party conflicts—the false aims, the false steps—the happy strokes, the disastrous blunders, that preside in turn over the birth and alteration of most laws. The great writers and thinkers have not been at one in this point. They have put forth many theories to cover the obscure, and to make less dark that which was already dark. They say that the object of law is to promote the general happiness—to promote the virtues of fortitude and temperance—to pursue justice—the general good—whatever is right—to obey the will of God—to do to others as we would they should do to us—to give to everyone his due and hurt nobody—to protect property—to protect

[1] ERSKINE said "the people should be taught that government is a trust proceeding from themselves—an emanation from their own strength—a benefit and a blessing, which has stood the test of ages, that they are governed because they desire to be governed, and yield a voluntary obedience to the laws because the laws protect them in the liberties they enjoy."—*Ersk. Speeches.*

GUIZOT says: "The highest perfection of government is to avoid compulsion, and substitute for it purely moral means—an influence over the understanding. Therefore that government, in which compulsion is least employed, is that which is most conformable to its true nature, and most completely fulfils its duties."—*Guizot, Civ. Eur.* Lect. 5.

all from injury—to promote the self-interest of each—the greatest happiness of the greatest number—the good order of society—the punishment of wickedness—the just relations existing between various classes—the eternal fitness of things.

Phrases such as these may contain much that is true, and yet express too much or too little. They are manifestly vague, and more obscure than the thing defined. One requires only to take a chapter of the law in its detailed form and endeavour to test it by any of these guiding principles, in order to admit how impossible it is to find or pursue the thread. Those seem to err most who assume that it is possible to give to the law any abstract and sweeping object, such as the pursuit of virtue or happiness. All nations must have laws, and probably there is, or ought to be, a motive and object nearly the same in all. Yet when we reflect out of what crude forms the most highly-developed laws of modern civilisation seem to have been evolved—how entirely empirical the law has been in its progress—how new rules and new ideas seem to have been little else than the haphazard saws and apophthegms of some individual a little wiser than his contemporaries, but whose best thoughts were sufficiently appreciated to be acted upon, till a better and stronger man arose who could see further into the future, and had newer and still better methods to suggest—when all this groping by the way is considered, it is easy to excuse the ancient legislators from exhibiting any well-defined aim, or aspiring to too lofty a moral purpose. The records of barbarous tribes seem to disclose the fact that there are few germs corresponding to our leading laws. The barbaric mind is incapable of generalising, except in the imperfect fashion of children. To expect savages to comprehend such abstract notions as personal freedom, culpable homicide, pauperism, education, wills, bills of exchange, would be to expect them to speak in unknown tongues.

If civilisation were to be traced step by step, perhaps all the law at first required for each member of a tribe would be found to be nothing more definite than the measure of the patriarch's will. When two or more patriarchs joined their families, this feeling would become a calculation of the propensities displayed in common by two or more rulers

till a ruler of rulers appeared, who claimed supreme attention, and set generalisation again at work. Polygamy, slavery, witchcraft, protection against theft and assault seem to take shape among the first settled habits, and habits are the laws of barbarians; but the order of development and the particular impulse given to one habit rather than another are too obscure to warrant any dogmatic conclusions. The history of different races of mankind, the reasons why some seem to have for ages remained stationary—some to have deteriorated or disappeared—others to have outstripped the rest—and why some habits afterwards become matured as doctrines of law and flourish more among one race than another—why the best laws when sown in some soils fall on stony ground, flourish for a while, and then decay—all these mysteries furnish endless speculations, and echo and re-echo along the lines of history without leaving any certain voice.

But whatever may have been the order in which law arose, this much is certain, that law in some vague and crude form must have always accompanied the association of human beings. These associations may have been casual or permanent—small in numbers or great; but each and all the individuals composing it must have had some occupation, even if it were the occupation of idleness, and each must have had some sense of restraint. The two things are inseparable, and the mutual complement of each other. If the members of the tribe took to hunting, or fishing, or tilling the ground, or tending cattle, or exchanging goods for things thought valuable, each of these several occupations must have been wholly impossible without a sense of mutual restraint—vague and indefinite though it might be. The patriarch of his tribe could never have been sure of a meal--he must have worked at the work of Sisyphus, if he could not sleep in peace and in the consciousness, that when he rose in the morning he would still remain master of yesterday's acquisitions. Whatever might be the work of the day, he would require to be satisfied that he had not to repeat it on the morrow; and yet, unless his companions divined his wishes and abstained from peculation and all interference, this could never become a settled conviction. The greater the number of the tribe, the greater would be the need for restraints to correspond—the more urgent it

would be safely to guard the hoard which so many hungry eyes surrounded. In this sense it would be of no importance what were the circumstances of the society or the occupations of its members, for the same principles would apply. All employments end in a store for the future, and that little capital would require to be secured against the depredations of others equally anxious to gain an investment, and still more anxious to do so without the trouble of working for it. The same circle of cares would be repeated through all the succeeding stages of advancement, however complicated might become the labours, the desires, and the possessions of individuals. What each would seek above all things would be—not to be interfered with by others[1]—to be let alone—to pursue his occupations to their logical conclusion—to reap where he had sown—to sleep behind his own ramparts—and to riot in the luxury of possession.

Security is the end and scope of all municipal laws.—What then can be the scope and end of all laws, but simply to further and render more certain and secure whatever occupation each individual has thought fit to adopt? The less others interfere with him, and the less he interferes with others, each has more time of his own—better repose and more strength—he gets in the long run more of what he wants, and loses less than he would lose, if there were perpetual interference, perpetual robberies, and perpetual recaptures—stratagems by night and battles by day—each carrying his life in his hand, and seeing an enemy in every bush. Here, then, is the true sphere of the law. The law has and can have no other object than simply to secure to each the utmost possible value—the widest field—the securest enjoyment for his varied employments. It is this security against interference, which makes all grades of civilisation

[1] The Chinese code states that the chief ends proposed by the institution of punishments in the empire have been to guard against violence and injury, to repress inordinate desires, and to secure the peace and tranquillity of an honest and unoffending community.—*Staunton's Code of China*, lxvii.

Not unlike this was the beginning of the written laws of the Lombards in the edict of King Rotharis (A.D. 644). "The object of the edict was to relieve the poor from oppression, and restrain the insolence of the rich and great, that every one might live in peace and enjoy his property undisturbed."—*Leg. Longob.*

akin—which is the universal haven in which nations find rest. There are degrees of intensity, of delicacy, of completeness; but it is one fundamental and indivisible consciousness underlying all the variations of race, and climate, and soil. The rude barbarian can appreciate it as fully as the polished citizen. The untutored Indian, who carries all his goods on his back—who finds a home under every tree—who gives few hostages to fortune—enjoys a sense of security against his equals as sensibly, though not so intensely, as the merchant prince, whose corn, and cattle, and servants are scattered over many provinces, whose ships ride in every sea, and whose note of hand is sold in all the markets of the world.

Object of law is not to enforce virtue.—If therefore law be the restraint enforced in order to secure more effectually to each the benefits of his own occupations, there is avoided much of the vagueness and mystery surrounding those definitions which give no motive at all, or identify that motive with the knowledge or pursuit of what is right. That the law necessarily enforces what is right cannot be contended, and yet that there must be some motive is equally apparent. The supreme power, whether centred in one person or in many, may make mistakes, and must often retrace its steps. There is a conscience attending the exercise of all power which requires to be educated. Not only may the supreme power make mistakes, but it is conscious that its power, though supreme, is limited in all directions. It has not the power nor the capacity to make men religious or moral, though some vague conception of such an attempt may have haunted most of the early legislators, and has led to many mistakes in all ages. What is right and what is wrong is a problem, not more easy, at the same time that it is not more difficult to be solved by the legislature than by the individual. But the legislature has neither the organs to discover, nor the machinery to enforce, nor the time to watch religion or morality among the people. This would be too ambitious and universal an empire; and yet some restraints for order's sake may be classed under the head of assisting and protecting those who do good. In civilised states the promotion of religion and virtue is an occupation of many, and requires the same protection as other occupations.

What the law orders or requires is however not necessarily identified with what is right, and it is frequently made the instrument of what is wrong. A man may do all that the law requires, may avoid all that the law forbids, may be blameless in its eyes; he may pass his life without even once directly invoking its aid, or provoking its punishment, and yet he may be of no esteem, but rather a scorn and derision among his fellows. Just he may be, for the law to some extent makes this compulsory; but beyond this he may be the negation of all that is worthy and of good report. The law deals only with the outward acts of man; but beyond the range of the visible there is a vast and widening empire, into which no legal proceses can run—the seat of feelings and contemplations and the stable joys of life. Voluminous as the law is, it would require to be a thousand times more voluminous if it were to incorporate all the precepts of moralists and the delicate distinctions of casuists and divines. It is impossible for the law to rule where nothing can be seen, or heard, or felt, and where all the movements are silent, and the result incomprehensible and incommunicable.[1]

[1] GUIZOT observes: "When societies have attained a great development morality is no longer written in their codes. The legislature leaves it to manners, to the influence of opinion, to the free wisdom of men's wills: it expresses only civil obligations and the punishments instituted against crimes. But between these two terms of civilisation, between the infancy of societies and their greatest development, there is an epoch when the legislature takes possession of morality, digests, publishes it, commands it—when the declaration of duties is considered as the mission, and one of the most powerful mediums of the law."—3 *Guiz. Civ. Fr.* Lect. 9.

ARISTOTLE seemed to think that civil society is founded, "not merely that its members might live, but that they might live well, for the first care of the legislator must be that its citizens should be virtuous;" "otherwise," he said, "civil society would be merely an alliance for self-defence." "A state," he said, "is a society of people joining together, with their families and their children, to live well for the sake of a perfect and independent life."—*Arist. Pol.* b. 3, c. 11.

Modern nations, however, have arrived at a conclusion the converse of Aristotle's, for they seem all agreed that his secondary object is their main object, namely, that society is an alliance for self-defence, and his primary object is their secondary object, that of making citizens virtuous. This latter object is beyond the scope, and baffles the ambition of all governments. It may be assisted indirectly, but cannot and ought not to be attempted directly. The empire of virtue

Law does not dictate occupations.—Another thing to be noticed, is that the law can only give security to the occupations of individuals after each individual has discovered and entered on them. It does not pretend to teach individuals how to live—how to work, what to do, or what they can do best. It is true that in Mexico and Peru the lower classes could follow no craft, no amusement or labour, nor even marry, without leave of the government.[1] But this close paternal care has been rarely attempted even by the ancients. Each may be trusted to find faculties and impulses wherewith to employ himself, and which the law can neither give nor take away. The vast variety of human occupations are not the creatures of the law, though the law can do much to make these occupations fruitful. The seed is already sown in the ground; the law only keeps the birds of the air from devouring it.[2]

is not of this world, and is maintained and extended by arts and methods nearly altogether irrespective of human laws.

ROBERT HALL, a great writer, traced similar ideas with admirable felicity and power in his *Apology for the Freedom of the Press.*

ASHURST, J., said: "It is beyond the power of the law to rectify men's minds, and to infuse into them that noble fire which burns in the breasts of good men, and prompts them to doing of praiseworthy actions, and promoting the happiness of their country and the good of their fellow-creatures; but it is in the power of the law to take from evil-minded men the ability of doing mischief, and to restrain them of that liberty which they so grossly abuse."—22 *St. Tr.* 234.

C. J. FOX said that the state had no right to inquire into the opinions of people, either political or religious; it had a right to take cognisance only of their actions.—28 *Parl. Hist.* 1267.

[1] Wikoff's Civilis. 10.

[2] PYM—"The law is that which puts a difference betwixt good and evil, betwixt just and unjust. If you take away the law, all things will fall into a confusion. Every man will become a law to himself; lust will become a law, and envy will become a law: covetousness and ambition will become laws. . . . The law is the boundary, the measure betwixt the king's prerogative and the people's liberty. Whilst these move in their own orbs they are a support and a security to one another. The prerogative alone is a defence to the liberty of the people, and the people, by their liberty, enabled to be a foundation to the prerogative; but if these bounds be so removed that they enter into contestation and conflict, one of these mischiefs must ensue: if the prerogative of the king overwhelm the liberty of the people, it will be turned into tyranny; if liberty undermine the prerogative, it will grow into anarchy. . . . The law is the safeguard, the custody of all private interests. Your honours, your lives,

The current divisions of municipal law.—When the definition of law is ascertained, the next task is to divide the law into its leading departments. Here also considerable diversity of treatment has prevailed. It is at this point that the philosophers and moralists part company with the jurists and practical lawyers. All may with equal justice claim some qualification to define law and its province, for to do so requires no special familiarity with the details of the science. But in order to distribute the materials under distinct heads—to assign the place of each leading doctrine, and proceed from generals to particulars, much special knowledge is all but essential. Accordingly, in this part of the subject there are fewer authorities, and those which exist are more strictly technical and practical than in the other. It is here also that the peculiar tendency of the legal temperament begins to manifest itself—the tendency to follow with more fidelity than reflection whatever some great master has laid down on some previous occasion more or less akin to the present.

One division into judicature, legislature, and government.—At the outset one large division of the law suggests itself—that which distinguishes the judicature, the legislature, and the government. Aristotle remarked that in all states there must be, first a legislative power, secondly, a power of government, and thirdly, a judicial power.[1] And Montesquieu and later writers make or repeat the same distinction.[2] But these divisions do not touch the substantive law: they are rather the means of giving effect to that law.[3]

your liberties and estates are all in the keeping of the law. Without this every man hath a like right to any thing."—*Forster's Pym*, 169.

FILANGIERI said his conclusion was, that a government should interfere as little as possible, and let everything take its own course.—*Filang. Sci. della Legisl.* ch. 11. Human laws are made, not to punish sin, but to prevent crime and mischief.—*Pollock*, C.-B. Att.-Gen *v.* Sillem, 2 H. & C. 526.

[1] Arist. Pol. b. 4, ch. xvi.

[2] L'Esprit, b. ii. ch. 6.

[3] MONTESQUIEU, *Esprit des Lois*, b. 1, ch. 3. "Law in general is human reason, and is either political law or civil law. The former is the law relative to the governors and the governed, the latter is the law relative to the mutual relations of citizens. The largest degree of liberty which the constitution and circumstances of the country will permit is the object in view. Liberty is the right of doing whatever the laws permit."—B. 11, ch. iii.

The substantive law consists of all the legal rights and duties which exist between man and man. The administrative law gives effect to, maintains, and enforces this substantive law. These three distinctions manifestly pervade all law. Every analysis must find them as ultimate facts incapable of further simplification. The substantive law is the object and end of the judiciary, legislative, and governing powers. These are nothing but means and machinery. By this, however, it is not meant that they are inferior in interest or importance. On the contrary, a machinery and an orderly procedure are often the most important parts of the whole economy of national rights. They include the forces which keep the commonwealth in healthy working order. Under the head of the judicature is found the settled mode of appointing judges and securing to them the means of independent judgment, of obtaining for litigants an impartial hearing, a trial by jury, a system of trustworthy evidence, an inexorable and rigorous enforcement of judgments. Under the head of the legislature, the smooth working of the law depends greatly on the election and appointment of representatives of all the great interests and forces which make up the nation—the security of public meetings—easy access for all to suggest improvements and mitigate anomalies and hardships—the introduction and publication of new statutes—the assent and consent of the governed—all that accompanies and makes up the complete accord between the growth of the law and enlightened public opinion. Under the head of government or executive power we trace the modes of securing mutual respect and harmony between sovereign and subject by a fixed succession in one royal family—the accessibility of the subject to the sovereign—the distribution of social honours—the power of pardon—the control of military and

LOCKE on this subject says, that as "the laws have a constant and lasting force, and need a perpetual execution, or an attendance thereunto, therefore it is necessary that there should be a power always in being which should see to the execution of the laws that are made and remain in force. And thus the legislative and executive power come often to be separated. There are two powers—the executive and the federative—the former comprehending the execution of the municipal laws of the society within itself upon all that are parts of it: the other the management of the security and interest of the public without, with all."—*Locke*, *On Govt.* b. ii. tits. 144-147.

naval forces—the defences of the nation—the ordering and conduct of war—a vigilant protection of those subjects of the realm who have resorted to foreign countries. By these and like methods the irresistible force of sovereign power is tempered to the tenderest concerns of the subject, so that the meanest peasant feels that his little all is guarded by the same puissant arm that subdues provinces, gives away kingdoms, and baffles the armaments of foreign invaders.

Judicature, legislature, and government are machinery to work the substantive law.—Taking the judicature, the legislature, and the government as three distinct departments of the law, they are each and all in the nature of machinery. The great substantive law remains outstanding, and embodies the mutual relations of subject and subject—their rights, their wrongs—their remedies, their duties, their privileges, their securities. It is true some of these are closely interwoven with the relations between subject and sovereign, subject and legislature, subject and judge. But it is to achieve and maintain the substantive law that these three great functions are devised—functions which, moreover, are mostly executed by subjects chosen from their fellow-subjects. Thus the whole system of legal relations and rights is compactly built up. But to achieve and maintain in perpetual vigour the body of substantive law, judges, senators, and sovereign combine, and go hand in hand. For this result sovereigns reign, legislatures devise and amend laws, and judges decree justice.[1]

Divisions of the substantive law.—The divisions of the

[1] "The administration of government, like a guardianship, ought to be directed to the good of those who confer, and not of those who receive, the trust."—*Cic. De Off.* b. i. ch. xxv.

"It is manifest that the power of kings and magistrates is nothing else but what is only derivative, transferred and committed to them in trust from the people to the common good of them all, in whom the power yet remains fundamentally, and cannot be taken from them without violation of their natural birthright, and from hence Aristotle and the best of political writers have defined a king, 'him who governs to the good and profit of his people, and not for his own ends.'"—*Milton's Ten. of Kings.*

BOLINGBROKE says: "Kings are made for kingdoms, and not kingdoms for kings. Majesty is not an inherent, but a reflected light."—*Bolingbr. Pa r. King.*

substantive law are not so various as the definitions of law, for philosophers have taken no part in them. Lawyers and jurists have been left in undisturbed possession. The ancient legislators cared little for method. The Roman law was the first subjected to systematic and critical treatment, and supplied the outline of the current divisions, at least until the time of Bentham.

Divisions of law in Roman and foreign writers on law.—The method of Gaius, who confines himself to the treatment of private law only, that is, the law as between subject and subject of the commonwealth, is to subdivide the law into the law of persons, law of things, and law of actions. Such also is the division of Justinian's Institutes.

As regards this division, it is enough to say that the law of actions applies indiscriminately to both the other divisions, and is indeed a necessary supplement to both. And the law of persons has no clear boundary dividing it from the law of things, either in fact or theory, for things may be said to have no existence except by and through persons.

Domat abandoned the Roman division of law into persons, things, and actions, and divided all private law into two main parts, viz., engagements and successions. Engagements were subdivided into those common to individuals, and those common to individuals affected by certain relations of family and marriage. Successions included wills and legal distribution and descent. This division was far-fetched, and obviously leaves out, or at least leaves in a subordinate position, what is felt to be of pre-eminent interest and importance.

Leibnitz enlarged on the defects of the celebrated division of law into persons, things, and actions, which had been originally published by Gaius and adopted by Justinian in his Institutes. He sought to divide jurisprudence into as many parts as there are causes which produce rights and obligations. These he analysed into five. The first was nature, which gives the liberty and power of dealing with that which is the property of no one. 2. Succession, by which the rights of deceased persons are transferred to heirs. 3. Possession. 4. Contract. 5. Injury. This division had much merit, but cannot be said to be

exhaustive, or to bring out all the chief causes of rights and obligations.[1]

[1] VICO expressed an idea that legislation, dealing with man as he is, found him the slave of three vicious passions, which distracted all mankind—ferocity, avarice, ambition—which produced the army, commerce, and the court. These three great vices were moderated by legislation, and converted into sources of civil order and felicity. —*Vico, Nuov. Sci. degli Elem.* The same author observed that all nations, barbarous or civilised, separated by time and space, yet agreed in three customs. All have a religion, all solemnly contract marriages, all bury their dead. These were three eternal and universal customs, and were the first principles according to which all nations arose and are preserved.

Vico, however, was wrong as to the two latter universal customs, as records of many tribes show that marriage and burial are not universal characteristics. The grounds are moreover too vague to suggest any methodical division.

KANT adopted the general division of the duties of law according to Ulpian: 1. *Honeste vivere.* 2. *Neminem lædere.* 3. *Suum cuique tribuere.* These three maxims can, however, be viewed as nothing but phases of one fundamental conception, each being only a different mode of expressing the same thing. In order to know what is the meaning of not injuring anyone, we must know what is an injury, and that again implies that we know what each is entitled to as his own, and what is the complement of legal rights—in other words, each of these phrases amounts to little more than saying that law is law. It is too indefinite to be of use in arriving at an insight into the structure of the law, and is obviously founded on no clear analysis.

The French code is subdivided into the civil code, the commercial code, the code of civil procedure, the penal code, the code of criminal procedure. The two first codes contain much in common, and though the three last relate to procedure, they do not clearly bring out the substantive rights of which crimes and wrongs are only the violation.

SAVIGNY divides law into constitutional or public law, and private law. The first has for its object the state, that is, the organic manifestation of the people; the second has for its object the judicial relations, which encircle the individual man. In the public law the whole appears as the end, the individual as subordinate; but in private law the individual man is the end, and every juridical relation is regarded merely as means for his existence or his particular benefit.—*Sav. Syst. of Mod. Rom. Law.*

STAIR, the leading Scotch jurist, after noticing the Roman divisions into persons, things, and actions, rejects it, and lays down the subject thus:—1. Constitution and nature of rights. 2. Conveyance, or translation from one person to another, whether from living or dead. 3. The cognition of rights, which comprehends the trial, decision, and execution of every right by the legal remedies. These, however, form in reality only one head, which might have been called rights, and their enforcement.

Division of law according to English writers.—The division of law according to English writers has been entirely founded on that of the Roman law. Bracton first treats systematically of the whole body of the law, both the substance of the law and the procedure appropriate to its several heads. He follows the civil law, and divides the subject into the law of persons, of things, and of actions, the last head being subdivided into criminal and civil actions. Persons are divided into freemen and villeins, or slaves, and their status and rights are qualified by age, sex, and family.

Britton neither defines law nor gives any systematic classification of the subjects it includes. He only describes the courts as they then existed and the business they dealt with, and then treats of everything else under the head of personal actions and real actions, the last forming the most important, as they deal with the possession of and property in land; and the great disturbing facts were the death, marriage, or disseisin of the owner, round which most of the details revolve.

Fortescue, Coke, Plowden, and minor writers say nothing of consequence as to the divisions of law. Plowden loosely says the law of England has six principal foundations: the law of reason, the divine law, the general customs of the kingdom, certain principles and maxims, particular customs, and statutes.[1]

Hale and Blackstone's division of law.—Hale, whose division of the law has been little criticised and generally accepted, divides law into civil law and criminal law.[2]

[1] Plowd. Com. 811. Doct. & St. 12. Cowell, Instit. 4.

The Speaker of the House of Commons, himself a lawyer, told King James I., at the end of his second parliament, that our laws were of three kinds: 1. The common law, grounded or drawn from the law of God, the law of reason, and the law of nature, not mutable. 2. The positive law, founded, changed, and altered by and through the occasions and policies of times. 3. Customs and usages practised and allowed with time's approbation and without known beginnings.—1 *Parl. Hist.* 1046.

[2] Civil law consists of civil rights of persons and things—persons being natural and artificial, and having certain capacities and certain political, economical, and civil relations *inter se*. Under persons are arranged magistrates, supreme, like the legislature and the executive, or subordinate, like the ordinary courts. Things are temporal, like highways, bridges, rivers, ports, and private estates; or ecclesiastical,

Hale, it is to be observed, candidly admits that he had not thoroughly thought out the subject of a division of the law, and did not profess that his division was the best. He believed that he could under some head in his outline manage to put every chapter and verse of the law. But more than that he did not profess. And it is obvious that under almost any division of law that may be selected all the various subjects could be arranged. The question, however, at present is, Which is that division of the law which arranges the details in their most natural order, and such as will commend itself most to those who enter upon the study of the law, or contemplate it from the ground occupied by intelligent laymen?

Blackstone, following Hale, says the primary division is into rights and wrongs. Rights are subject to a division into those which concern the persons of men, and are then called *jura personarum*, or the rights of persons, and into those which a man may acquire over external objects or things unconnected with his person, which are styled *jura rerum*, or the rights of things. Wrongs are also divisible into, first, private wrongs, which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and, secondly, public wrongs, which, being a breach of general public rights, affect the whole community, and are called crimes and misdemeanors. Thus the four great divisions of the law are said to be, rights of persons, rights of things, private wrongs, public wrongs.[1]

Blackstone's method thus consists in, first, dividing all law into the law of persons and the law of things; he next divides law into the law of civil injuries and civil procedure, and the law of crimes and criminal procedure.

like churches, chapels, benefices. And, finally, civil law includes wrongs and their remedies. Criminal law is not treated in detail, but its subjects are more or less similar.

[1] 1 Bl. Com. 138. Most of the critics of Blackstone's division take much credit to themselves for pointing out the so-called absurdity of this division, viz., "rights of things," and they gravely remark that things can have no rights, and that he ought to have said "rights relating to things." Such critics have only shown that they had not read what Blackstone himself says (2 *Bl. Com.* 1): "*Jura rerum* are those rights which a man may acquire in and to such external things as are unconnected with his person."

The last division, however, pervades indiscriminately the first and second divisions, so that in reality, though there may be a convenience in treating the subjects as he has treated them, there cannot be said to be any exhaustive method or any clear line of demarcation covering the whole field of the law. Even the boundaries of the law of persons and the law of things are intermixed and undistinguishable in several directions.[1]

Bentham's and other divisions of law.—Bentham, after reviewing previous systems, selected, as the best general arrangement of a code of laws, the threefold division of penal law, civil law, and constitutional law.[2] He said, all previous attempts at a code were imperfect or faulty in their analysis, but he had so arranged his own scheme that every title and chapter found an appropriate place. He rejected the Danish code, the Swedish code, the Frederician code, the Sardinian code, the Theresan code, as imperfect or disorderly. He observed, that, though Blackstone's plan was arbitrary, it was preferable to all those which preceded him, and his was a work of light in comparison with the darkness which previously covered the whole face of the law.

Bentham's own view of the advantages of his division is well deserving of attention, whatever may be thought of the success with which he carried it out. He said that his classification was the most natural, that is to say, the most easy to be understood and remembered. It was simple and uniform. It was best adapted for discourse, that is to say, best adapted for announcing the truths connected with the subject. It was complete, for there was no imaginable law, to which it was not possible by means of it to assign a proper place. It displayed intention, for it was so contrived that the very place, which any offence is made to occupy,

[1] "Blackstone pursues a metaphysical inquiry upon the nature of laws in general, eternal and positive laws, and a number of sublime terms, which I admire as much as I can without understanding them. Instead of following this high *priori* road, would it not be better humbly to investigate the desires, fears, passions, and opinions of the human being, and to discover from thence what means an able legislator can employ to connect the private happiness of each individual with the observance of those laws which secure the well-being of the whole?"—5 *Gibbon, Misc. Works*, 546.

[2] 3 Bentham, 157.

suggests the reason of its being put there. Lastly, the classification was universal, for it was governed by a principle which was recognised, by all men, and would serve alike for the jurisprudence of all nations. On this last crowning feature his language rose into enthusiasm. He says: "In a system of law framed in pursuance of such a method the language would serve as a glossary, by which all systems of positive law might be explained, while the matter would serve as a standard by which they might be tried. Thus illustrated, the practice of every nation might be a lesson to every other, and mankind might carry on a mutual intercourse of experiences and improvements—as easily in this as in every other walk of science. It might thus possess a utility independent of the use which might be made of it by the governments of the world. If the different penal laws in the world were arranged according to this method, all their imperfections would become visible; without argument respecting them, they would be discovered by inspection. Here would be offences omitted, there imaginary offences; here redundant laws containing numerous descriptions of different kinds of theft or personal offences, &c., instead of one general law. This classification would, therefore, prove in legislative science what instruments of comparison, such as the barometer and thermometer, have been found in physical science."[1]

Objections to the current divisions of law.—None of the current divisions of the law carries on its face with sufficient clearness the reasons for its existence. And while it would be tedious to discuss the details in order to make manifest this defect, a better division seems to be suggested by imitating the way in which intelligent minds approach the study of the law for the first time, and, as Gibbon observed, by investigating human desires, fears, passions, and opinions. As to those who are already familiar with the practice of the law, and have already of necessity formed for themselves some classification of their own, any other classification may be felt to be superfluous. But however the law may have been first studied, and by whatever approach its details may have been reached and mastered, it will yet generally be found, that it is only after years of attentive reflection that the vast and confused materials

[1] 3 Bentham's Works, 172.

arrange themselves in the mind in any settled order. When this occurs, groups and sequences are readily visible. Each chapter and verse has its appropriate record in the pigeon-holes of the memory. A panorama of such a kind as this may be said to be the necessary result only of close attention and long manipulation, and yet differs materially from any of the current methods.[1] Law is mastered only after great experience, or rather after the reflection which supervenes on experience. By whatever access the precincts are entered, the interior economy is found to be the same, yet the contents are sorted differently. Each may have accomplished the conspectus in his own way, and the arrangement may be as various as the mental idiosyncracies of the learners. It is however only by having regard to the definition of law, if any such can be found, that a clue out of the labyrinth of details can be most readily obtained.

What is the best division of municipal law.—In considering what is the best division of the municipal law, it will therefore be useful to recall the definition already given, namely, that it is the sum of the varied restrictions on the actions of each individual, which the supreme power of the state enforces, in order that all may follow their occupations with greater security.[2] Now if this is correct, nothing can turn on the law relating to persons, as contradistinguished from the law relating to things. Things have no separate existence in the eye of the law any more than in the eye of the metaphysician, but they are known only by and through persons who have rights and wrongs in respect of them. The law begins and ends with persons and their doings; all else is sequel and development. A mountain, a house, or a ship has neither rights, nor wrongs, nor remedies.

[1] WHEWELL says the primary and universal rights of men are five: (1) The right to personal security; (2) the right of property; (3) the right of contract; (4) family rights; and (5) government.—*Whewell*, 1 *Elem. Mor.* s. 80.

An able writer, MR. SHELDON AMOS, suggests the following division of subjects for a code of English law: (1) Laws relating to the constitution and administration of the state; (2) laws of ownership; (3) laws of contract; (4) laws affecting special classes of persons, such as husbands and wives, parents and children, professions, corporations; (5) laws of civil injuries; (6) criminal law; (7) laws of procedure.—*Amos on a Code.*

[2] *Ante*, p. 27.

Its owner only can enjoy and suffer, maintain and vindicate. But the method of Blackstone is to begin with persons as distinguished from things, and to describe successively the sovereign, the members of the legislature and of the government, justices of the peace, sheriffs, coroners, constables, overseers, clergy, husband and wife, master and servant, guardian and ward. We are informed of some of the things which each of these individuals does. But most of these particulars are merely special functions appertaining to a few members singled out from the whole community. Such functions and special features form but a small proportion of the total rights of these individuals. What is special is transitory and insignificant compared with the great residue of rights permanently vested and centred in each and all alike. The sovereign, indeed, stands in a position somewhat apart. But all the other individuals, the legislators, judges, officers, husbands, masters, parents, guardians enjoy precisely the same rights, as the rest of the undistinguished throng. They buy and sell, enjoy and vindicate, acquire and transfer and bequeath, are born, live, and are buried in the same manner as the rest of the community. What is common to them with their fellow-citizens is so vast, compared with the few particulars in which they differ, that it is illogical and purposeless to constitute them into a separate division on that account, and far less into the first of the divisions. These special functions are all in the nature of variations caused by what they do, and how they come to do it. Whatever each has to do may be necessary to the working out of the whole system either as means or machinery; but men are not made in order to keep up these particular functions; the functions are made for the men and the circumstances, to serve some purpose in the general economy of the commonwealth. The mass of the community consists of men who have identical rights—who differ from each other only in subordinate and unimportant particulars. What each and all can, or cannot do, forms the fundamental conception of all law. What each has and enjoys, stripped of all the accidents and adventitious circumstances which cause distinctions to be maintained, is the standard to which all varieties refer. The normal man—his rights, his wrongs, and his remedies—is the leading

idea, and claims the first attention; and all divisions of subjects must be subordinate to that. The law of persons as treated by the Roman law, and by Hale and Blackstone, ceases to have any distinct bearing, when we seek to analyse the conception represented by the normal man, of whom all individual persons and functionaries are but insignificant variations.

Reasons for discarding the current division of the law as to persons.—If one were to seek a reason why the Roman division of the law of persons was first adopted and has so long kept its ground, such reason is not far to seek. When mankind consisted of freemen and slaves,—when one-twentieth, or one-tenth, of the population were heroes, and the rest were in the rank of cattle,—such a distinction appeared of the highest importance, and must have filled a large space in the mind's eye. The early and middle ages had similar reasons for accepting the order laid down for them by their predecessors. The Roman and mediæval mind could never rise to the height of moral elevation in which the essential equality of mankind in the eye of the law is an elementary and ineradicable first principle, not to be frittered away, or tampered with, or lost sight of for a moment—which no variety of time, or place, or circumstance can modify or reverse—which the kindest and most fatherly treatment by the most humane of proprietors can never dispense with, supersede, or obliterate—the want of which cannot be atoned for by wealth, or ease, or kindness, or comfort, or late-acquired freedom—a sentiment which, when once enjoyed, can never be relinquished—without which a hidden want is always felt—without which life itself is poisoned at every pore. It was a weakness of the ancients not to be forgotten, that it never occurred to their legislatures, that human beings were all on one level as to legal rights,—that there was no foundation for classifying them according to the colour of their hair or their skin, their origin, their race, their climate, their stature, their virtues, their poverty, or their misfortunes. Whether a man was caught in battle or found at peace, was a mere accident of the moment. It never entered into the mind of Plato, or Aristotle, or Cicero, or Tribonian, and all the council of Justinian's jurists, that there ever could be a state of society in which the great majority did not consist

of slaves. Hence it was as excusable for their law as it is inexcusable for ours, to start with the great division of freemen and slaves.[1] And the other parts of the same division, namely, parent and child, husband and wife, guardian and ward, master and servant, had so much of the slavish element transfused into them, that they naturally bore company with the first. But now, after centuries from the dawn of Christianity, since the name of slavery has been expunged from the book of civilisation, the distinction of freeman and villein, and all the distinctions flowing from that tainted source may be at once discarded as founded on a delusion never more to be tolerated among mankind. It is a delusion, that, because there are and must be inequalities in the rank and condition of individuals, these may or ought to be further aggravated by making them perpetual and irreversible, altogether irrespective of personal merits. The chance of war or the accident of an accident is now confessed to be a worthless excuse for seeking to rivet the permanent and galling yoke of slavery upon those, who are conscious of the same "hands, organs, dimensions, senses, affections, passions" as their owners, and differ in nothing but the unequal weights imposed upon them at their start in the same race. Whatever be the price of holding fast to this first and unchangeable condition of society—the personal freedom of each individual—that price we must, in the words of Montesquieu, be content to pay to Heaven.[2]

[1] De Tocqueville—"The most profound and capacious minds of Greece and Rome were never able to reach the idea, at once so general and so simple, of the common likeness of men and of the common birthright of each to freedom, and they strove to prove that slavery was in the order of nature, and that it would always exist. Nay, more, everything shows that those of the ancients who had passed from the servile to the free condition, many of whom have left writings, did themselves regard servitude in no other light. All the great writers of antiquity belonged to the aristocracy of masters, or at least they saw that aristocracy established and uncontested before their eyes. Their mind, after it had expanded itself in every direction, was barred from further progress in this one, and the advent of Jesus Christ upon earth was required to teach that all the members of the human race are by nature equal and alike."—*De Tocqueville* (tr. by Reeves).

[2] Don Alphonso of Castile, in 1337, gained immortal credit for procuring from his assembly a law, that no rank should exempt men from the laws.—8 *Univ. Mod. Hist.* 43.

Ancients not likely to have attained just notions of division of laws.—However great were the ancients in some of their moral aspects, however acute as thinkers on philosophical subjects, and however sensible in the law of buying and selling, their notions of human government and of the mutual relations between man and man in social and political life were derived, among the Greeks, from an experience of petty communities, and, among the Romans, from an organisation loosely compacted of barbarous tribes. On all the leading points in daily life their thoughts were not our thoughts. Who could now be satisfied with the ripest wisdom of Plato and Aristotle, of Cicero and Tribonian, after having been taught by Pym and Eliot, by Hampden and Selden—the greatest geniuses for government that the world has ever seen?[1] Whatever was the circle of doctrines and practices, ends and methods, that passed as law with the ancients, it can scarcely find its counterpart in the stately panorama of rights and liberties, mutual checks and securities, between kings, legislatures, and judicature on the one hand, and subject and subject on the other hand, as these passed before the masterly intellect of Pym, whose great ideas and conquests we inherit, fortified and matured by the stirring events of two centuries more.[2] The Sermon on the Mount, and all that

BULLER, J., well handled the common saying about "one law for the rich and another for the poor": "There is not in this country one rule by which the rich are governed, and another for the poor. No man has justice meted out to him by a different measure, on account of his rank or fortune, from what would be done if he were destitute of both. Every invasion of property is judged of by the same rule: every injury is compensated in the same way, and every crime is restrained by the same punishment, be the condition of the offender what it may. It is in this alone that true equality can exist in society; different degrees are necessary for every government, and greater talents and industry will in the course of things give one man a superiority over another. And without some distinction and rank the magistrate would want authority, virtue would be without one of its strongest incentives, and the prudent and industrious would remain on a footing with the idle and the dissipated." —*Per Buller*, J. (*O'Coighly's case*) 26 St. Tr. 1193.

[1] Warburton so described them.—*Forster's Pym.*

[2] PYM, one of the greatest of Englishmen, in 1641 struck a key which might have led to a division of laws much superior to Hale's and Blackstone's, though Pym himself was not a trained lawyer. He says: "The greatest liberty of the kingdom is *religion*: thereby we

flowed from it, communicated no ideas to ancient jurists and legislators, and scarcely penetrated the darkness of the middle ages. The sumptuary laws of the ancients long misled the mediæval governments, which, without reflection, imitated and adopted them. Slavery was the informing spirit of all their social arrangements, and however suitable their definitions and classifications of legal doctrines may have appeared to them, we must search out others more in harmony with the dignity of the individual, and the indelible equality of the various races of men in the eye of the law. Higher standards of justice and of social life demand a method as far asunder as possible from all pagan ideas and practices.

Best division of law is according to subjects of occupations.—First division is SECURITY OF PERSON.—But though the division into persons and things, however ancient, is now obsolete and unmeaning, there is an obvious distinction between laws according to their subject-matter. As Leibnitz pointed out, law may be divided into as many parts as there are causes which produce rights and obligations. What then are those causes when viewed in relation to the normal man? What are the great subjects round which rights and obligations are grouped?

The first of these may be said to be such as relate to the protection of the body against wrong and interference. Of all the intimate relations between two distinct things, that between mind and body is the most intimate. A man may have property in external things—little, or much, or

are freed from spiritual evils, and no impositions are so grievous as those that are laid upon the soul. The next great liberty is *justice*, whereby we are preserved from injuries in our persons and estates; from this is derived into the commonwealth peace and order and safety, and when this is interrupted, confusion and danger are ready to overwhelm all. The third great liberty consists in the power and privilege of *parliament*, for this is the fountain of law, the great council of the kingdom, the highest court; this is enabled by the legislative and conciliary power to prevent evils to come; by the judiciary power to suppress and remove evils present. If you consider these three great liberties in the order of dignity, this last is inferior to the other two as means are inferior to the end; but if you consider them in the order of necessity and use, this may justly claim the first place in our care, because the end cannot be obtained without the means, and if we do not preserve this, we cannot long hope to enjoy either of the other."—*Forster's Pym*, 93.

none at all; he may enter into contracts—many or few; may have a sense of religion, of freedom, of free thought, free speech, and public worship; he may feel a strong interest in legislation, government, and the administration of justice. But none of these things touches him so closely as his own body, as the sense of life and health, of pain and pleasure, of locomotion and imprisonment. Property, contract, reputation may be dispensed with; they are separable, and may be viewed at a distance, but mind and body remain in indefeasible partnership, not to be forgotten, ignored, or left in abeyance for an instant, and to maintain the integrity of which all the instincts of the individual combine. The common duty of self-preservation is one, which, as Erskine said, nature writes as a law on the hearts of even savages and brutes. The first of all subjects dealt with by the law is none other than the person or body. Coke said, "the liberty of a man's person is more precious to him than all the rest that follows."[1] Here the law has its first and its most emphatic statements and expositions to make. What it does to protect the body against attacks, and whether this protection is made effectual by action, by indictment, or by self-defence—by direct or circuitous processes—it is obvious that a large and pre-eminent part of the law must be set apart to this subject alone. Not only must the body of each be protected against wrong caused by the acts of others, but inasmuch as the chief medium of punishment, of coercing the will and shaping the conduct, is the pain and anguish of the same body, there is an obverse side of the medal also to be contemplated. Whatever the law does to protect the body of one person necessarily involves correlative liabilities attaching to the persons of others. If one is to be protected against murder, mutilation, and insult, this cannot be, except by the inflicting of pain and suffering on the body of some other What is vindicated by one must be suffered by another. The very same body, in order to enjoy for itself, must also submit to some restraint for the sake of that very enjoyment in others. Each acts and reacts on the other. What each gains is at the expense of the rest, or rather, all the others are put

[1] 2 Inst. 45.

under restrictions, in order that each one may be free from interference as to the end to be achieved. Whatever, therefore, the law says or does for the protection of the body—whatever the body suffers by way of punishment as the counterpart of that protection—these constitute the double aspect of its legal treatment. In short, all that law does or can do with the body—the best and the worst that can happen to it—constitute the first and leading division of municipal law. Such a division recommends itself to all states of civilisation. It makes all modes of government and grades of society akin. Every system of law, or semblance of a system, cannot choose but do something to make some provisions, good or bad, which collectively form the law of the security of the person.[1]

Variations in division of security of person, by age, sex, insanity, death.—The first division of law—that which relates to the security of the person, includes all the modes by which the body is protected against wrong, whether threats, or acts of violence of every degree, while the machinery by which this protection is worked out—the punishment, pain, and death of the wrongdoer—is a necessary sequel, and concludes all that the law provides for the body. In further pursuing this subject, however, it is to be noticed also, that the normal man is assumed to be of full age and of sane mind, master of his own actions, and as independent of all other individuals as other requirements of the law

[1] A great judge (PRATT, C. J.), carried away with the heat of argument, said "the great end for which men entered into society was to secure their property. That right is preserved sacred and inviolable in all instances, where it has not been taken away or abridged by some public law for the good of the whole."—Entick *v* Carrington, 19 St. Tr. 1030. This phrase is often repeated, but instead of being the great end, property is only one of ten great ends, each, or at least several of the others, being quite as important in all respects, as a consideration of the other nine divisions of the law will make sufficiently obvious.

Others said: "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."—*Milton, Areop.* "The two great pillars of the government are parliaments and juries. It is this gives us the title of freeborn Englishmen, for my notion of free Englishmen is this, that they are ruled by laws of their own making, and tried by men of the same condition with themselves."—*Pawle*, arg. 8 St. Tr. 183. "The liberty of discussion is the chief safeguard of all other liberties."—1 *Macaulay's Hist.* ch. 10.

permit. The body has, so to speak, some mental characteristics attached to it. The rights and wrongs of the full-grown sane individual form the main subject. But man is liable to certain incidents which cause variations of these rights. He is born—he passes part of his life as an infant, his judgment ripens with his body, and he dies. These leading circumstances all indicate certain variations of the same subject, for there must be laws peculiar to the state of infancy, peculiar to the state of insanity, and peculiar to the stage of death, the chief of which is burial. There are also other variations of a like kind caused by sex. Some peculiar laws are required for one sex which are not required for the other, and some for insane persons which are not required for sane persons. All these, however, are only variations of the main and substantive law of the normal man, the basis of all legal conditions. The incidents above mentioned, being the occasions of these variations, require accordingly to be noticed at the conclusion of the account of this first division of the security of the person.

Second division of law is SECURITY OF PROPERTY.—When the law has said all that can be said about the body, other divisions must be thought of; and here again it is useful to recall the definition of law, which was stated to be a series of restrictions on the actions of man. This leads to the inquiry, What are the main actions or occupations of man? These at first sight seem so nearly infinite as to be scarcely reducible to order. But after some consideration it will be found, that all human occupations, tendencies, and objects, so far as the law has to do with them, are reducible to a few leading heads. These should, for purposes of method, be as nearly as possible independent of each other, and as nearly as possible first principles of human nature. The most conspicuous of all the occupations of man, next to the care of his own body, is that of the enjoyment of property. This is a tendency or an instinct not to be resolved into anything simpler, though philosophers have indulged in many speculations as to how this tendency is created, how it grows, and what metaphysical elements combine in its formation. It is enough for the law to assume, that the desire to enjoy property may be said to be a legal instinct requiring no further explanation, any more

than the instinct of the bee, the squirrel, or the beaver. The law can neither give nor take it away; it springs eternal in the human breast, and all that the law can do is to protect and regulate it to a small extent.[1] It has obviously no relation, such as the casual hoards of the lower animals have, to a few days' maintenance, though the appetite often supplies its first motive power. It grows from a material into almost an intellectual habit, and its effects far outgrow any relation to the bodily wants. While the lower animals live from hand to mouth, man accumulates stores which can never by any possibility be needed for his own personal use; and the desire to maintain intact these acquisitions is nearly the last infirmity which leaves the mind in the living body. No law can wholly extirpate this desire to accumulate property; it is independent of all laws, though it engrosses so much of the energy of man, that no law can afford to leave it unnoticed.[2] It is always treated as if too much can never be made of it. The way in which the law protects and encourages the individual in his accumulations of property is by provision against interference from theft and injury, from trespass and molestation. The subject-matter of property and the mode of enjoyment form a large part of the whole. The details of the restrictions are necessarily manifold, and it is enough to say that the second great division of the law is this security of property. And it is subject, like the former division, to the variations caused by birth or infancy, sex, insanity, death, each of which conditions gives rise to peculiar provisions in aid of the fundamental instinct of accumulating property.

Third division is SECURITY OF MARRIAGE.—The third great division of the law is also totally distinct from, and not resolvable into either of the others. It relates to marriage—a tendency, or an instinct, or whatever it may be called—which is wholly independent of law, which can only be restrained in a small degree, and yet the details of its restrictions are also manifold, and have cost all legislatures much thought and care. In one respect the division relating

[1] CICERO said that commonwealths and states were established principally in order that men should hold what was their own.—*Cic. De. Off.* b. ii. c. 11.

[2] AS PYM said: "Without law every man has a right to everything."—*Ante*, p. 46.

to marriage is only such a variation of the two former divisions as is attributable to sex, for when two persons are married this relation causes changes in the individual rights of each, both as regards their persons and their property. Nevertheless, marriage fills so large a space in human life, and its results extend so far, and involve so many third parties, that it is a division of itself, and cannot be properly included in any other. It begins with the form of a contract between two persons, but it has wide and far-reaching effects; and, when children are born, fresh subsidiary relations are created, and still further intricacy pervades the property of each of the group. The main restrictions on the actions of man in reference to marriage are those which confine the relation to certain persons not being near relatives, to mutual control both of the person and of the property of each—to the mutual maintenance of children and parents, together with still further variations caused by infancy, insanity, and death. The security of marriage is therefore one main division of the law, and includes all the peculiarities caused by this natural and inevitable union between man and wife.

Fourth division is SECURITY OF PUBLIC WORSHIP.—After the security of the person, property, and marriage, comes a division also independent of all these, and referable to no other head. This is the tendency or instinct of public worship. In all states of society there is a gravitation towards the supernatural and the infinite—to take cognisance of a Source of power independent of man, and confessedly his master. Speculations on this subject, with a view to attain definite ideas as to a great First Cause, are unceasing. But no tribe of savages is so rude, no grade of civilisation so illiterate on the one hand, or so refined on the other hand, that the tendency to worship a god publicly does not take some shape, and become a conspicuous feature of social life. The very lowest glimmering of this characteristic of man may be nothing more definite than a suspicion of witchcraft. The tendency to public worship, as apart from private worship, is radical and irrepressible: it pervades human nature in all countries; and the law cannot avoid putting some restrictions on human conduct in relation to it. How far all shall be compelled to follow certain uniform ceremonies and creeds—how one class of

men are set apart to the sacred profession—how far certain property is dedicated to its use—how far dissenters and even impious opponents are tolerated—all the particulars surrounding this human tendency are included under that division of law entituled the security of public worship.

Fifth division is SECURITY OF THOUGHT, SPEECH, AND CHARACTER.—A fifth division may be said to be devoted to the intellectual side of human nature—the tendency to free thought and speech, and social reputation. These three subjects are closely connected together, and they are altogether independent of the mere care of the body, the mere care of property, of marriage, and public worship. How far free thought, speech, and reputation are protected and regulated—the liberty of the press, libel, all that flows from the desire of the human mind to exercise itself on the affairs of life, and on the communication of ideas between man and man fall under this division, which may be called the security of thought, speech and character.

In some respects this division may be said to include the security of public worship, which forms the subject of the preceding division, for at the root of both is the freedom of thought and the protection of that freedom. But public worship even to this day in many countries exists without much freedom of thought, and the law is so voluminous on both subjects, that it is expedient to separate them on that account. Moreover, public worship includes the relations of man to his Maker, while this division concerns mostly the cognate relations between fellow-men.

Sixth division, SECURITY OF CONTRACT AND BUSINESS.—The next division of the law consists of the tendency of man to enter into contracts in pursuit of his occupations and interests, to manage his own affairs in his own way This tendency is by no means, as some philosophers would have us believe, the creature of the law, any more than the previous divisions. There would be contracting, bargaining, buying, and selling, whether there were law, or not. This division is large, and covers a great variety of human occupations not touched by the former divisions. Contracts fill up a great portion of the life of each individual, and the law for various reasons interferes with and controlls numerous kinds of businesses and trades for no other

reason than because the exclusive pursuit of each one's own interest too frequently leads to unnecessary interference with the interests of others. All these fall under the head of the security of contract and business.

Seventh division is SECURITY OF FOREIGNERS.—The last division of the substantive law is founded on a circumstance common to all countries possessing a tincture of civilization, that of tolerating strangers or foreigners—persons who were not born in the same community, in which they nevertheless for various reasons are found from time to time. Whether and to what extent the municipal law suffers modification when the rights and wrongs of these strangers are dealt with, naturally forms a distinct subject, not flowing out of the former divisions. No law can leave the case of foreigners unprovided for. Their rights and interests may be intermixed with those of native subjects; but they call for some special treatment, and as a matter of fact occupy the attention of all legislatures. This branch of the law is often called private international law, but the security of foreigners is a more appropriate title, and it is a necessary supplement to all the preceding divisions. It also brings out more distinctly all that relates to jurisdiction over subjects natural born, and born in colonies and foreign dependencies. The legislature has for centuries been busy with altering and modifying such common law as barbarous ages and crude ideas of justice allotted to foreigners. The freedom of these to come and go, and buy and sell, was protected by Magna Charta itself.[1] And numerous statutes down to the present day have kept up the perpetual interest in this subject.

The division of administrative law is threefold.—The seven divisions now enumerated divide between them the whole substantive law. But there still remains the administrative law, which, as already described, resolves itself into three parts: the judicature, the legislature, and the executive government. They are called administrative law, because they have the relation to the substantive law of means to the end—of machinery to the result achieved. They keep the substantive law in perpetual vigour, defining what is obscure, amending what is defective, and keeping all the great functionaries employed in distributing it within their

[1] Mag. Chart. c. 30.

respective orbits. They collect and maintain the materials for keeping the peace within the territory, and represent the empire in all its extra-territorial interests.

Eighth division of law is into THE JUDICATURE.—The judicature is the division of administrative law which contains the distribution of jurisdiction among various courts and functionaries. How judges are appointed, and what privileges or peculiarities distinguish them from the rest of the community—what rules they follow in administering justice—hearing parties, excluding irrelevant topics, enforcing judgments and sentences. The leading methods resorted to of securing to each the best satisfaction against wrong and the violation of the substantive law, so far as law can give redress, form the eighth division—that of the judicature. This division involves also many securities of the individual; but as all these are subordinate to the leading idea of expounding and applying the law, they fall under this division as their natural and appropriate place.

Ninth division of law is THE LEGISLATURE.—The legislature is the ninth division of the whole law and includes all that relates to the constitution and working of the three estates of parliament—showing how the members of one branch of the legislature are elected, and what privileges attach to them—how the members of another branch of the legislature are first appointed and afterwards succeed by inheritance to their function—how the legislature proceeds in enacting new laws—who are the parties to their enactment—what are the parts of a statute when completed and how it is expressed and interpreted—what is the relation of the legislature towards the subject on the one hand and towards the executive government on the other hand. These particulars are included in this division of "the legislature."

Tenth division is the EXECUTIVE GOVERNMENT.—Lastly, the executive government is the keystone of the arch, and includes all that relates to the sovereign and the prerogatives vested in this supreme office—the course of the succession—the appointment of high officers of state, and their respective functions—the prerogative of pardon, the chief command of the army and navy, the relations of the sovereign towards the subject on the one hand, and towards the legislature on the other hand, the representation of the

empire in all matters of peace or war, when dealing with foreign countries, and the treatment of foreign subjects and foreign property in times of war. And the government is not entirely imperial, but has subordinate and derivative grades, there being to some extent parts of the legislature and executive government delegated to functionaries and communities under various forms of local self-government, the chief organs of which are municipal corporations, counties and parishes, and sanitary districts.

Summary of tenfold division of law.—This tenfold division collects and exhausts all the matters which the law deals with in a natural and intelligible order. The law cares nothing for, and has no leisure to ponder over, the metaphysical and philosophical elements into which they may be still further reduced. In the region of practical life, which is that in which the law lives and moves, there are no more simple and more elementary conceptions than these ten to be found. That each individual has an instinctive tendency to take care of his own person, to amass property, to marry, to worship, to think, speak, and make a character to himself, to enter into contracts, to live or hold fellowship with foreigners, to resort to courts of justice, to submit to legislation and to government, cannot be explained by any intuition or by any experience, and must be accepted as postulates. How and under what restrictions these tendencies are regulated and encouraged, constitutes the burden of every code. One code may, more than another, sketch each of these divisions with a freer touch—may leave a blank here, may show a barrier there—may blur the canvas with misshapen forms, may write some edicts in characters of blood, may fill chapters with incongruous and mistaken details. But each and every subject must be treated more or less pointedly, or its place must be marked out. Not one of them can be safely omitted, and it is by the balance of light and shade, of clearly developed forms and the most natural play of human action, that the best code is distinguished. A picture of many hues, of complex and many-sided groups, is the result. It may require a nice appreciation to compare each detail of one code with the corresponding detail of another code; and it is only by a comprehensive experience of its many points of contact with many minds, that a rational

estimate can be made of the degrees of perfection attained and attainable. But in every human society a place must be found for each of these ten divisions of subjects, and it is impossible not to find something, however crude, which every human code has to say upon each of them.

In order, therefore, to make still more clear the foregoing arrangement and distribution of subjects, this "Division of the whole law" will assume the following simple tabular form:—

I. SUBSTANTIVE LAW.
1. Security of the person.
2. Security of property.
3. Security of marriage.
4. Security of public worship.
5. Security of thought, speech, and character.
6. Security of contract and business.
7. Security of foreigners.

II. ADMINISTRATIVE LAW.
8. The Judicature.
9. The Legislature.
10. The Executive Government (including local self-government).

CHAPTER II.

EXPLANATION OF PHRASES AND TERMS USED IN THE LAW.

Other divisions and terms used by legal authors.—A definition and a division of the law, however perfect, do not exhaust the requirements of those who make their preliminary survey of so wide a subject. There are so many technical distinctions, phrases, and words, which have long been current, and which exercise the reflections of all men, that some notice of these will be useful before we proceed to the particulars of the law itself, in their settled order. Many of these words are the tools of the art, and have been used and applied in various senses, according to the prevailing theories of those who have written on legal and political subjects. Some of these distinctions may be found to rest on a mere confusion of ideas, may be superfluous or misleading, or imperfectly defined. They are, however, sufficiently interesting or important to require separate treatment.

Such are the phrases and words—liberty of the subject—political and civil liberty—origin of government—the social or original contract—the divisions into constitutional law, public and private, civil and criminal law—commercial law—law of nations—private international law—law of nature—law of God, or divine law—feudal law—civil law—canon law—common law and statute law—written and unwritten law—judge-made law—adherence to precedents—legal fictions—law and equity—codification—right—duty—obligation—wrong—crime—felony—misdemeanour.

Meaning of the liberty of the subject and civil liberty.—The liberty of the subject is a phrase of the law of England which has acquired great and just renown; but as it has been made the theme of declamation rather than of strict

legal treatment, it requires some care to discriminate its true import and define the length and breadth of its contents. And as the idea involved in it lies at the root of all natural definitions and divisions of the law, it requires all the more attention in this place.

Views of Locke, Somers, Beccaria, as to freedom.—Locke says that the end of law is not to abolish or restrain, but to preserve and enlarge freedom, and where there is no law there is no freedom.[1] Somers said, that when a people have no assurance of their liberties or lives, but from the grace and pleasure of the governor, they are but beasts of burden; and by continual base subserviency to their masters' vices, lose all sense of true religion, virtue, and manhood.[2] Beccaria, in his masterly way, explains his notion of liberty thus: "The opinion, that every member of society has a right to do anything, that is not contrary to the laws, without fearing any other inconveniences than those which are the natural consequences of the action itself, is a political dogma which should be defended by the laws, inculcated by the magistrates, and believed by the people—a sacred dogma, without which there can be no lawful society—a just recompense for our sacrifice of that universal liberty of action common to all sensible beings, and only limited by our natural powers. By this principle our minds become free, active, and vigorous—by this alone we are inspired with that virtue which knows no fear, so different from that pliant prudence worthy of those only who can bear a precarious existence." [3]

Other authors of eminence give each his own account of the proper use of the phrases—liberty or freedom, natural, civil, and political: and Blackstone, Paley, Austin, Mackintosh, and M'Culloch, may be referred to for valuable observations on this subject.[4]

Difficulty of reconciling current accounts of liberty.—It must be confessed, that their descriptions of civil liberty do not entirely agree, and somewhat bewilder the mind. Blackstone rather unnecessarily introduces, what he calls natural liberty, or the law of nature, as the standard or

1 Locke, On Govt. b. 2, tit. 57. 2 Somers, Sec. of Engl. p. 1.
3 Beccaria, c. 8.
4 1 Bl. Com. 140. Paley's Mor. Phil. b. vi. 1 Austin Jur. 281. Mackintosh, L. of Nat. M'Culloch, Pol. Econ. p. 1, ch. 10.

common ground of departure; but this tends to confuse his account. Austin seems to view political and civil liberty as something in the nature of a gift from the sovereign government, and as contradistinguished from political or legal restraint. Locke and Beccaria are the writers, who seem to look with the steadiest eyes at the central idea involved. Each writer prefers to explain in his own way a phrase which comes home so forcibly to every one, who has thought of the first principles of society.

Certain it is, that liberty has been the theme of poets, orators, and patriots for ages, and though vague may be the notion they have attached to it, the liberty of the person, and freedom from imprisonment may be said to be the basis of their declamations.

Wentworth in 1575 told the House of Commons that he had found in a little book of that time the words, "Sweet is the name of liberty, but the thing itself beyond all inestimable value."[1] Sir Benjamin Rudyard exclaimed in the great debates in the time of Charles I., that "liberty is a precious thing, for every man may set his own price upon it, and he that doth not value it, deserves to be valued accordingly."[2] Sir R. Phillips of the same period said that if we can be imprisoned at the will of another, "why do we trouble ourselves with the disputes of law, franchises, and propriety of goods?"[3] And Pym said, "If the liberties of the subject were taken away, there should remain no more industry, no more justice, no more courage: who would contend, who would endanger himself for that which is not his own?"[4] "Freedom," as Dryden said, "was the English subject's prerogative."[5]

[1] 1 Parl. Hist. 784. [2] 3 St. Tr. 173. [3] 3 St. Tr. 66.
[4] 3 St. Tr. 342.
[5] *North Briton*, No. 45.

DE TOCQUEVILLE says: "That which at all times has so strongly attached the affection of certain men is the attraction of freedom itself, its native charms, independent of its gifts, the pleasure of speaking, acting, and breathing without restraint, under no master but God and the law. He who seeks in freedom aught but herself is fit only to be a slave."—*De Tocquev. France*, 506 (tr. by Reeves).

"The essence of liberty," said CICERO, "is to live just as you please."—*Cic. De Off.* b. i. c. xx.

DUNNING said that "for the great benefit of the public and individuals, natural liberty, which consists in doing what one likes, is

Liberty of subject arises out of legal restriction.—The explanation of the phrase, "liberty of the subject," can scarcely be said to involve much difficulty after the definition and division of the law are settled; or rather, it is merely the correlative and obverse side of the same idea. It may be vaguely described, as Cicero described it, as in some sense indicating the right to do as one pleases without check or interference. But this is a crude conception, and requires much qualification. The sense of mutual restraint, though unuttered or seldom expressed, grows necessarily out of all associations of human beings, and the law is nothing but an elaborate development and classification of the limits and phases of this self-restraint. Such self-restraint is like an instinct, or like the muscular sense pervading all forms of activity and all modes of conduct. Liberty of the subject is the counterpart of this restraint. Most actions being more or less controlled, nothing is or can be done by any individual member of a community, without some conscious or unconscious regard to the correlative and equal acts and conduct of others.

There is no absolute liberty.—There is indeed nothing even among the most isolated groups of savage life which approaches to absolute liberty, if such a term be used in the sense of each doing what seems good in his own eyes, regardless of all that is done by others.[1] The liberty of

altered into doing what one ought."—20 *St. Tr.* 71. "All antiquity resounded with the fame of the Xanthians and Paterans, whose intense love of liberty led them to prefer total extinction to their subjugation by a conqueror."—*Plut. Brut.* *Appian*, B. 4.

In the debates of 1758 it was said that "liberty consisted in not being obliged to do or suffer anything but under the direction of known laws; that such as do not inherit wealth are nevertheless heirs to freedom, and they who have no other property have a property in their liberty. Indeed such, above all others, may be thought to have the best title to liberty, since it is the only valuable enjoyment to which they can lay claim."—15 *Parl. Hist.* 888.

[1] A traveller has well observed, that the life of a wild beast is one of constant fear and anxiety. Every antelope in South Africa has literally to run for its life once in every two days, and many times in each day starts or gallops under a false alarm.—*Trans. Ethn. Soc.* The savage is always suspicious, always on the watch, always the prey of fear, and sees invisible enemies in every bush. An intelligent traveller remarks: "Man in a savage state has little freedom of thought or action, no development of intellect, benevolence, or any

the wild beast is said to be the slavery of fear. Not so with man. The mutual help, the mutual fear, the mutual play of appetites, passions, affections, soon shape with invisible hand the conduct of each, so as to avoid collision, invite help, exchange valuable possessions and offices. A second nature thus grows up, strengthening and expanding rather than suppressing all that is the most cherished and the most intensely enjoyed by the individual. When the liberty of the subject, or civil liberty, is spoken of, it is not meant that he, who possesses it, can do what he likes, but only that he obtains the greatest possible value and benefit out of his own faculties and circumstances. It must be remembered that the more protection is given to each, the more checks must be imposed on all others. Liberty cannot be protected, as Bentham said, except at the expense of liberty.[1] And as was better said by Sir R. Atkins, "a just law is no restraint to a just liberty; it rather frees us from a captivity and servitude, namely, to that of our wills and passions."[2] But in a well-devised system of checks and counterchecks, the sense of restraint is lost in the greater intensity and enjoyment of those faculties and tendencies, which are thereby rendered effectual, and made secure, and which are the better part of human nature. Civil liberty, or the liberty of the subject, is not the liberty to murder and plunder, to libel, cheat, and oppress all that stand in the path of selfish ambition, aggrandisement, or indulgence; it is the liberty to attain the largest measure of all desirable things by means of repressing and regulating those incompatible tendencies of others, so far as any human power can repress them. The restraints on men as well as their liberties are, as Burke observes, to be reckoned among their rights.[3] The means to be used must be such as are not incompatible with the attainment of the same ends by each and every member of the community. Civil liberty is a mixed sentiment, compounded of a sense of mutual restraint, of equality, of justice, and of co-operation.[4]

other great qualification. . . The young and weak are helpless; their laws and customs are as binding as our laws, though handed down orally."—2 *Grey's Austr.* 217, 219.

[1] 1 Benth. W. 301. [2] 11 St. Tr. 1207.

[3] Burke, Fr. Rev.

[4] MONTESQUIEU said everyone has given the name of liberty to the

Much variety may exist in the complex arrangements devised by each nation for conferring the greatest security on the pursuits of its subjects, and it is not surprising that one nation should differ from another in such details. The natural aversion and resentment against bodily pain, imprisonment, and deprivation of property, and the greatest variety of weapons of self-defence against all evil designs tending to that result, whether on the part of the subject or of the sovereign, but more especially of the latter as being the most powerful, constitute what is usually called in England "the liberty of the subject."

Liberty not confined to bodily freedom.—The liberty of the subject is thus a phrase not limited to the security of the body, and it was at first used in contradistinction to the encroachments of the crown; but its essence pervades all the other divisions of the law relating to property and general business. The phrase "civil liberty" is perhaps not so comprehensive, yet it is dissociated from mere bodily freedom, for it embraces all modes of protection by the law against wrong and interference whencesoever proceeding, more especially in relation to the encroachments of one's fellow-subjects. The phrase, "political liberty," again, is that phase of civil liberty which regards the participation of the subject in the machinery of legislation and government. Such participation is of inestimable importance, for in practice it renders the most peremptory edicts of irresistible power much less irksome. It disarms of its terrors that absolute tyrannical force which in all societies must necessarily be wielded by the sovereign authority. It takes the sting out of that inevitable prostration of the

government which agrees with his habits or inclinations.—*Spirit of L.* b. 11 ch. ii. "We are all agreed as to our own liberty. We would have as much of it as we can get. But we are not agreed as to the liberty of others, for, in proportion as we take, others must lose."—7 *Bosw. Johns.* 257.

Liberty is a word used in popular authors very loosely. Even Adam Smith says: "Laws which are in violation of natural liberty are bad," without defining what natural liberty is.—*Wealth of Nat.* b. 4. ch. i. "Such is the excellency of the English constitution that the meanest subject is not beneath the protection of the laws, nor the highest beyond their reach. Thus to be governed is the full perfection of civil liberty."—*Per Sir F. Norton*, R. *v* L. Byron, 19 St. Tr. 1185.

individual will which all men dislike, but cannot escape; and converts into willing obedience what otherwise would be unrelenting antipathy and undying resistance.

Liberty of subject and political liberty not estimated by number of their restraints.—The liberty of the subject and political liberty thus differ from each other only in giving more or less prominence to one or other of the constituent elements. They both denote the greatest protection extended to the body, the property, and ordinary pursuits, which can be attained in social life—the liberty of shaping one's conduct by laws confessedly just. When laws are originally or mainly framed by a large body of intelligent and select representatives, who declare them fit to be obeyed and enforced upon all, this is the nearest approach to self-made laws. But civil liberty is not to be estimated or measured solely by the number of the restrictions embodied in the laws. The mere number of these signifies little, for their value is often enhanced by multiplicity and variety. One restriction more or less is immaterial, when the whole fabric of the structure is instinct with freedom. This liberty, the reflex of the law, is the product of many forces—the result of incessant, far-reaching, and long-continued efforts of legislation—never attaining, yet ever approaching perfection. In short, the liberty of the subject is only another name for the highest security attainable in any community for the body, the estate, and the employments of life, more especially as these are secured against arbitrary imprisonment, against confiscation of property, and against suppression of free thought and speech.

Liberty of subject is counterpart of legal and self-imposed restraints.—The liberty of the subject, the natural fruit of the law, is said to be a government by laws, and not by men. It is entirely the counterpart and correlative of the restraints imposed by the laws on the rest of the community for the benefit of each individual. Such is the liberty of each individual to acquire and enjoy such rights as he deems most valuable, and which the laws have expressly secured for him by corresponding restraints put on all his fellow-subjects. These laws take care that none shall imprison or control him, except for causes well-known, and which he himself acknowledges in the abstract

to be just, and under warrants which issue from proper authority. They take care that he shall enjoy a large share in making and amending the laws, for laws self-imposed are always the least irksome. When thus originated and moulded—instead of being emblems of tyranny, the laws seem the emanations of the individual will, which it is the interest and pride of each and all to array themselves in supporting.[1]

Distinction of absolute and relative rights.—Here may be noticed a distinction which arises in some degree out of the liberty of the subject, and which some authors have attempted to draw between absolute and relative rights. Such a distinction will be seen at once to be founded on a confusion of thought. Strictly speaking, all rights are relative, that is to say, they necessarily presuppose a society of individuals, with regard to whom alone rights have existence. If there were only one individual in the world, he would eat and drink, and sleep, and probably would exercise his faculties in some way. But he could neither plunder nor murder, could neither slander nor defame, could neither buy nor sell. He would have no rights, nor would he have any wrongs. He would simply satisfy his personal wants if he could, and having no competitors or disputants, he could neither sue nor be sued. To speak of absolute as something different from relative rights is altogether unmeaning. All rights are equally the accompaniments

[1] "As popular liberty without government will degenerate into license, as government without sufficient liberty will degenerate into tyranny, they are mutually necessary to each other; good government to support legal liberty, and legal liberty to preserve good government."—*Bolingbroke*, *Patriot King*.

"The difference between free and despotic governments is not that the sum of liberties which the former leaves to its subjects exceeds the sum of the liberties which are left to its subjects by the latter. The excess in the sum of the liberties which the former leaves to its subjects may be purely mischievous. It may consist of freedom from restraints which are required by the common weal, and which the government would lay upon its subjects if it fulfilled its duties to the Deity. In consequence, for example, of that mischievous freedom its subjects may be guarded inadequately against one another, or against attacks from external enemies. . . . A free government leaves or grants to its subjects more of the political liberty which conduces to the common weal."—1 *Austin*, *Prov. Jur.* p. 283, 285.

of society, and all are alike enforceable by some legal procedure, otherwise they would not be rights at all. They may differ in intensity or in relative value and importance, according to the estimation of the individual; but in all essential particulars each is as absolute as the other. All that Blackstone probably really meant by the distinction between absolute and relative rights was this, that, of those rights which regard the person, some are common to all members of the commonwealth without exception, at least to all adult members; while others are conspicuous only in classes and sections of people, or rather they become more prominent in some circumstances than in others.[1]

Natural rights of man.—Again, it has sometimes been said that the three natural rights of man are life, liberty, and property, to which Bentham justly adds reputation. But this involves some confusion of ideas, for liberty necessarily includes life and property as well as reputation, and many things besides. Whatever be the laws under which human beings live, one of their essential tendencies, and indeed an inseparable quality of all human beings, is to cherish and defend life, and to create, accumulate, and defend property, and to aspire to various other enjoyments. Liberty is the radical condition of human life, and engrosses all the faculties and develops the habit of preserving life, property, reputation, and the general rights and results of all kinds of labour.

Origin of government, social contract, and divine right.—The origin of government and civil society has been a fruitful speculation in all ages, and many volumes have been written to explain by what stages each generation has reached and matured the complicated system of mutual checks, under which modern nations are well pleased to live. Philosophers have often suggested that in prehistoric days the community first chose the tallest and strongest man for a king, as Herodotus says the Ethiopians did in the time of Cambyses.[1] Such would be one who was pre-eminent for physical prowess—who had slain his thousands in battle,

[1] BLACKSTONE, taking up Coke's expression as to a prior period, says that the absolute rights are declared by the Act of Settlement to be the birthright of the people of England.—6 *Rep.* 231; 1 *Bl. Com.* 127. This was obviously a figure of speech, but a good one.

[2] Herod. b. 3.

and led the war-dance in intervals of peace. The mere habit of command and obedience may have induced the next most able and active of the same family to be promoted to the vacant chiefship, and then the choice may have finally settled for better or for worse in one tribe. Councillors and wise men would then gather round their leader, and fence all the avenues of tyranny about, till tier upon tier of caste and routine should make heavy and stable the seat of power. There is much fancy blended with all such speculations, and each has his own train of ideas and theories to smooth the way through difficulties, and trace the secret links of the chain of order. Much must in such a search turn on the point of departure, and all prefer a stage of barbarism to start from. How the patriarch from a huntsman became a shepherd, a husbandman, a trader—how one by one families flocked to walled towns, and a network of local government spread over the land—how units became tens, and tens became hundreds, and hundreds became thousands, till each tribe became merged in the crowd, and in the maze nothing but units could at length be clearly distinguishable, and thus became a new point of departure, each being then treated as the radical basis of legislation, and of social merit and responsibility.

Theory of growth from barbarism.—The theory of natural growth and development out of barbarism has, however, many difficulties. Tribes have for hundreds of years shown no signs of advancement, have lacked all invention in common implements—grown more stolid and mechanical—have stagnated in all the isolation of barbarism, and lost almost the lineaments of humanity.[1] A descent from higher to lower grades of barbarism is not only in accordance with observation, but is as inscrutable as inevitable in theory. Double difficulties surround every explanation, and some read backwards and some read forwards the legends of the past. It is enough, however, for lawyers to surrender all such speculations to the philosophers, and to know this and

[1] HUMBOLDT said he could not make out whether the savage state was a dawn or a sunset of better days: but preferred the latter hypothesis. NIEBUHR held that savages were the remnants of civilised tribes driven to the woods, and who had gradually forgot the arts of settled life. And WHATELY remarks that there is no record of savages ever civilising themselves.—*Whately*, *Ess. Civilis.*

this only, that no society can exist without the rudiments of laws and of government.[1] Laws, though often at first seemingly the sport of chance, are for a time credulously believed in; till simple faith is gradually transformed into scepticism, and reflection into criticism; and the era of reform slowly dawns over the torpid generations, quickening their intuitions till they find new aims, methods, and solutions for overcoming the many varieties of evil, want, and oppression. Societies, as Bolingbroke remarked, are "begun by instinct and are improved by experience." [2] In all stages of advancement, indeed, there are some landmarks not to be overpassed, some restraints inevitable and irresistible, and in all forms of government there is much of the machinery common, because human nature is much the same in every clime, and moves under the same influences. But no human sagacity or learning has yet made plain, why or how civilisation has quickened most in some climates, and among some races, however ingenious may be the theories which the vanity and self-glorification of nations put forth on this subject.

Theory of divine right and original contract.—Leaving, however, as inscrutable the historical origin of laws, and their earliest progress, there is still some mystery even in the later stages. Philosophers and divines have discussed two opposing theories—one of divine right, and one of social or original contract. One holds that the governor is heaven-descended [3]—to be received without misgiving

1 See *ante*, p. 6, as to savages without laws.

2 Bolingbr. Frag. x.

"It is reasonable to conclude that society was coeval with man, and that the savage in his woods exhibits the picture of fallen, degenerate man in an unnatural state—the ruined, degraded species rather than his living image in the infancy of the world."—*Filangieri, La Sci. d. Legisl.*—"The law of nature is inseparable from the nature of thinking beings: it subsists and will subsist for ever, in defiance of th[illegible]ns which obstruct it, the tyrants and impostors who would obliterate or annihilate it in blood and superstition."—*Ibid.* ch. iv.

3 "I believe that no creature now maintains that the crown is held by divine hereditary and indefeasible right."—*Burke, Fr. Rev.* "The senseless plea of divine and indefeasible right, repugnant to nature and common sense, implies that man can have a property in his fellow-creatures."—*Fox, Hist. Jas. II.* "The wild and absurd doctrine of divine right.'—1 *Bl. Com.* 219.

and obeyed without question—against whom to hesitate is treason, and to rebel is blasphemy. The other holds that all human associations are resolvable into a contract more or less akin to what is going on day by day between man and man, having a beginning and an end, a subject-matter and a remedy.

Between these extremes most men vibrate, and it is a matter of temperament, of age, of prosperity, of education, to which side each will most incline. Both theories have merits, and both have defects. In all ages and all times nature seems to predispose a sufficient array of contemporaries, so as to weigh evenly in these opposing scales. To assert or believe that a governor is placed over the governed, and maintained there irrespective of human influences and human wants, and that no derangement in the mutual adaptation justifies a change in the governor, in his prerogatives and his duties, is a dogma which it is too late in the world's history to maintain. On the other hand, to say that no respect is due to tradition, no virtue lies in habitual obedience—that there is no merit in adhering to good forms till better are made clearly apparent—that there is no natural harmony between a thoughtful governor and generous, industrious, and well-conditioned subjects, is equally far from the truth.[1] There is a divine right on the one side as well as the other. Each theory contains but half a truth, and their conjunction is needed to reconcile both phases of human life. What is clear is, that there is and can be no mutual relation or dealing between man and man on any subject, but that which is resolvable more or less into contract. When slavery ceases, contract

DOMITIAN, in European systems of government, seems entitled to some credit as to the theory of divine right. He insisted on his officials beginning, "Our Lord and God commands so and so."—*Suet. Dom.*

[1] "The comfort and basis of all governments is the mutual good affection that subsists between the magistrate and the people. If, on the one hand, the magistrate does not love the people, or if, on the other hand, the people do not look up to their magistrate with love and respect, that country never can go on in comfort and prosperity." —*Per Rooke*, J. 25 *St. Tr.* 1149. "The subjects have, in their several public and private capacities, as legal a title to what are their rights by law as a prince to the possession of his crown."—*Gen. Stanhope*, R. *v* Sacheverell, 5 *St. Tr.* 5.

necessarily begins. The most divine of divine rights is, in modern times, to improve and amend the municipal laws whencesoever derived, until all modes of oppression and wrong are made less oppressive and less wrongful—to be satisfied with no limit to the amelioration of every chapter and verse of the law, till it approaches nearer and nearer to the standard of justice which every individual carries in his own breast, and which advancing education and experience help him to define more and more clearly the higher he rises in the scale of civilisation.

Opponents of the theory of original contract.—Some vainly imagine that they reduce the theory of original contract to an absurdity, when they assert that no record exists of a large multitude of adult men and women co-equal in rights and powers meeting in a spacious plain, and choosing a governor and bargaining for their fealty on terms and conditions. They affect to pronounce all this an idle fiction. It is true enough that, except perhaps in very recent times, no human society was ever found in a state of disintegration, where the co-equal units marshalled themselves for the first time and at once in files and squares, and made up the machinery of a completed organisation. As Montesquieu observed, man is born in society, and there he remains. Every single member is born into society and dies out of it and there is no protocol or preliminary treaty made at his entry, nor is there at his exit any formal dissolution of partnership. At his birth each individual is bound hand and foot by heavy engagements made by his predecessors, and his likings or dislikings are wholly unattended to. The social contract has for him neither a beginning nor an end. He did not originate it, and cannot put an end to it. It has an ever-shifting foreground of terms and conditions—a remedy, which, if there is any, none can, single-handed, enforce. It may be less a theory than a figure of speech; it may be an apt illustration, though not a definition.[1] It has at least given permanent satis-

[1] LOCKE says: "If man be once allowed to be master of his own life, the despotical arbitrary power of his master ceases. He that is master of himself and his own life has a right, too, to the means of preserving it: so that as soon as compact enters, slavery ceases, and he so far quits his absolute power and puts an end to the state of war, who enters into conditions with his captive."—*Treat. Gov.* p. 2, ch. xv. § 172.

faction to the understandings of successive generations of English subjects, and has withstood the assaults of all the philosophers.[1] Magna Charta partakes more of the form of a contract than a deed of gift. The Petition of Right was a statement of terms and conditions assented to by the king, which is also in the form of a contract.[2] The

"With the enemies of freedom it is a usual artifice to represent the sovereignty of the people as a licence to anarchy and disorder. But the tracing up civil power to that source will not diminish our obligation to obey. It only explains its reasons and settles it on clear, determinate principle. It turns blind submission into rational obedience, tempers the passion for liberty with the love of order, and places mankind in a happy medium between the extremes of anarchy on the one side, and oppression on the other. It is the polar star that will conduct us safe over the ocean of political debate and speculation, the law of laws, the legislator of legislators."—*R. Hall, On Freedom of Press.*

HUME affects to demolish the fiction of an original contract by asking for the page of history in which it is recorded.—*Treat. Hum. Nat.* vol. iii. *Hume's Ess.* p. 2, § 12.

BENTHAM thinks Hume had exploded the fiction, but adds much of his own to the same effect, and resolves all into the principle of utility.—1 *Benth. Works*, 269.

LORD BROUGHAM says the doctrine of utility explains the origin of society better than an original contract.—1 *Brougham, Pol. Phil.* 51.

J. S. MILL says the same.—*Mill, On Lib.* 185.

HUMBOLDT says "it is useless to derive the obligation to submit to punishment from the original contract, for every criminal could escape his punishment, if, before undergoing it, he separated himself from the social contract, as in the voluntary exile of the ancient republics."—*Humboldt, Sphere of Government.* But this is running away with the analogy of a private contract instead of contemplating the substantial truth it embodies.

[1] 1 Stubbs's Hist. 530.

[2] THE BISHOP OF ELY said "the making of new laws was as much a part of the original contract as the observing of old ones."—5 *Parl. Hist.* 75. And SIR G. TREBY said the coronation oath obliges the sovereign to consent to such laws as the people shall choose.—5 *Parl. Hist.* 81. And the same was the view of L. SOMERS.—5 *Parl. Hist.* 204. It is true that in point of form the House of Commons refused to state this plainly.—4 *Campb. Chrs.* 100.

The historians of Arragon, who said they had a chief justice, who controlled king and subject alike, had a form at a coronation which was the plainest illustration of the social contract ever adopted. After the king swore to maintain the laws, the assembly replied, "We, who are as good as you, have taken you for our king and lord so long as you respect our laws and liberties, and no longer."—8 *Univ. Mod. Hist.*

At the coronation of Henry V. the Lords and Commons had such

coronation ceremony is a form of contract thinly disguised. The Revolution settlement was adopted expressly on the theory, that the original contract was broken by the abdication of James II., and another was substituted. On the very pillars of the commonwealth this phrase has been written large, and deserves to be treated tenderly. Even if it be a fiction, it is irrepressible, and has become ingrained as an inseparable condition of English political thought. The United States of America also bear on the face of their constitution an original contract, and some modern nations have substantially gone through the same process of resolving themselves into first principles, and then recombining under a new original contract, adopting many of the old terms.[1]

confidence in him, that they offered to swear allegiance to him before he was crowned, or had taken the customary oath to govern according to the laws.—1 *Parl. Hist.* 319.

[1] LORD CLARENDON said the phrase "original contract" was a new one, taken from some late authors, and the very phrase might bear a great debate.—5 *Parl. Hist.* 73. The idea was, however, old enough. Lycurgus's ordinances were in the form of a solemn contract, to which the gods were parties, as well as the people and the sovereign power.—2 *Grote's Greece*, 462. And ARISTOTLE's definition of law is that it was a declaration emanating from the common consent of the people.—*Ante*, p. 16.

THE PRESIDENT BRADSHAW told Charles I. that there was a contract and a bargain made between the king and his people. 4 *St. Tr.* 1013. And SIR R. PHILLIPS, in Darnell's case, had argued on this footing.—3 *St. Tr.* 65.

MILTON says men at first agreed by common league to bind each other from mutual injury, and ordained some authority to restrain by force and punishment what was violated against peace and common right.—*Milton's Ten. of Kings.*

ERSKINE said: "The greater as well as the lesser societies of mankind are held together by social compacts, and the government of which you are a subject is not the rod of oppression in the hands of the strongest, but is of your own creation—a voluntary emanation from yourself, and directed to your own advantage."—*Ersk. Speeches.*

LECHMERE said: "The original contract is an eternal truth, essential to the government itself, and not to be defaced or destroyed by any force or device. . . . Such was the genius of a people whose government was built on that noble foundation—not to be bound by laws to which they did not assent. Muffled up in darkness and superstition as our ancestors were, yet that notion seemed engraven on their minds, and the impressions so strong that nothing could impair them." —*Sacheverell's Case*, 15 *St. Tr.* 62.

The University of Oxford once said, it is true, the original contract

Reason why theory of original contract keeps its ground.—The reason why the theory of the original contract can never cease to be satisfactory is, that nothing else can explain and justify the perpetual desire of each individual to adhere to the laws, and yet to improve upon them, for all laws are relative to the wants of man, and no one man is acknowledged to be so absolute over all the rest as to suppress this desire. The terms of a continuing contract are referable to the growing consciousness that the condition of all can be bettered by expanding and adapting these terms to new circumstances and new views, such as come alike to all, and in modifying which all can or may take some part and have some voice. The contract may be made for each at birth by agents appointed by nature itself. The contract may not be terminated till death. The remedy may be not so much by reference to the law that exists, as to that which may grow out of improvements set in motion by common consent. In short the original contract is a continuing contract made for each at his birth, and lasting for life, with a proviso to refer all disputes to the law of the present, and with the soothing knowledge that all the parties may by some act of co-operation obtain a better law of the future. In this sense the original contract must always recommend itself to the understanding as a happy phrase or apologue, sketching the fluctuating relations between members of a commonwealth—between subject and sovereign—between subject and subject. It catches the attitude of equality, where each stands at arms'-length, claiming a voice in the solution of every difficulty and dispute. It thus satisfies the profoundest reflection and finds an echo in the general conscience, suggesting wholesome thoughts to all alike.[1]

was a damnable doctrine.—15 *St. Tr.* 255. And Convocation, in 1606, asserted that it was a great error to deduce civil power from the people, and not from God's ordinance.—1 *Hallam, Const. H.*, 322.

WHEWELL, however, defended the theory of original contract as a convenient mode of explaining the mutual relations of the governed and governor.—*Elem. of Mor.*

[1] It would have been a much more effective mode of exploding the theory of an original contract, if political philosophers like Bolingbroke and Hume, Bentham and Austin, Lord Brougham, Mill, and others, instead of treating it as a conclusive argument, that such contract is not a historical fact, had instituted a detailed comparison

Distinction of constitutional law.—Some authors have called part of the law by the name of constitutional law, being that which involves what they deem certain fundamental principles. Under this head are included the leading doctrines touching the relations between the government and the subject—the protection of the weaker against the stronger—the machinery which guards each subject against arbitrary imprisonment—the means of giving voice to grievances and of securing a fair trial in case of charges being made or insinuated. This, however, is but a vague distinction, for the vital and essential basis of liberty underlies not only these but most of the other branches of the law. Some of the topics may be intensely interesting to the majority of the people, not merely for what they are worth, but for the many struggles that led to their final settlement. Yet it is only a question of degree and nothing more, which distinguishes constitutional law from the rest

between it and an ordinary contract, so as to expose the want of analogy between them. This might have been done as follows, and Burke, in his "Reflections on the French Revolution," notices some of the points. In an ordinary contract both parties have an option and a power of refusing to enter into it; in the original contract they have no option, and are involuntarily entangled in it. In the ordinary contract the parties bind each other only during their lives, and seldom involve their heirs and executors, except for purposes of winding up the contract; in the original contract the unborn descendants to the remotest generations are equally included. In the ordinary contract there is some specific subject-matter to which it is confined, and it usually deals with an existing state of things; in the original contract both parties contemplate all the changes that shall ever happen, or shall ever be made in the law, and their mutual relations. In ordinary contracts there is a definite remedy (other than fighting, as it would be in a state of nature), namely, the power of rescinding it, or compelling the party who commits a breach to pay damages; in the original contract there is no definite remedy, no rescinding, and no damages are given or received.

Thus all the constituent elements of an ordinary contract are wanting in the original contract; but, notwithstanding this drawback, the latter may be the best mode of describing the mutual relations and attitudes of the parties making up a political society; and other theories are open to greater difficulties and absurdities if tested in the same manner. The law of nature, in which all the above writers would probably believe as an unquestionable verity, is exposed to precisely the same objection, namely, that it is not a historical fact, and yet this objection seems not to have occurred to them.

of the law. All branches of the law are more or less vital and interesting, and if some persons are more impressed by one chapter than another, this is too capricious a basis for a separate division to rest upon. Whatever relates to the government and to the legislature is only important as means to an end. In all the ten divisions of the law already enumerated there are matters of vital and enduring moment to each and all, and to single out some of these and call them constitutional law, however popular and useful such a collection may be, makes only a fanciful distinction without a difference. No such distinction can be recognised in any methodical distribution of the whole law.

Distinction into public and private law.—Some writers, following ancient authorities, divide law into public and private law. Public law, which by some is said to include constitutional law, is that law which relates to matters of public utility, and private law to be that which relates to matters of utility to individuals only.[1] Bacon seemed to approve of this as a good division, and in public law he included criminal law, ecclesiastical law, magistrates' law, politic law relating to the public peace and wealth.[2] This, however, has been justly said to be an unsubstantial difference, for all law must necessarily be of public utility, even though it relates in most of its aspects to the rights and property of individuals. The word public has little or no meaning as contra-distinguished from private law. All law is public in the sense, that the public or all the individuals composing the commonwealth are interested in each and every word of the law, for though each may come within the scope of only one part of it, still the law is open to all alike, according to the circumstances and situations which each may fill from time to time. And for the same reason all law is private, inasmuch as every or any part of the law may be brought to bear on each individually, and some must necessarily do so. There is no such thing as abstract law. All law touches some one or more individuals in one shape or another, and at some point. The public is merely the aggregate of the individuals. Even a private act of parliament, though intended primarily for the benefit of one individual, is of interest and import-

[1] Demost. Timocr.; Just. Inst. 1, 1, 3. [2] 7 Bac. Works, 733.

ance to the whole public, because *ex hypothesi* without that private act justice for that individual could not have been attained, and there is no object or merit in law at all, if it do not satisfy or profess to satisfy the sense of justice common to all men according to their respective situations. If, however, the words "public law" be used to indicate only those rights, powers, and duties, which flow directly out of certain offices connected with the government, the legislature, or the legal profession, such as the sovereign, the houses of parliament, the judges of the land, and legal and ministerial officers generally, and if private law means only those other rights and duties arising between individual and individual, the distinction is still vague and unsubstantial. For all that requires to be treated of under such heads are more correctly referable to the other main branches of the law, namely, the laws relating to the judicature, the legislature, and the government on the one hand, and the substantive laws relating to the person and to property, and the other heads enumerated.

Yet many legal authors make the division into public law and private law a leading division, and under the former branch include all that relates to crimes and criminal procedure, to highways, and things unappropriated or used by the whole public, thereby singling out from a great variety of subjects things that have no substantial value except as incidental to the primary rights and liberties of the normal man. If the words "public law" be deemed to include only those rights, duties, and powers connected with the judicature, the legislature, and the government, and which are often called political rights, then they are treated by some authors as only a branch of the law of persons. Hale includes all these subjects except crimes in his law of persons. Blackstone treats crimes as public wrongs, and makes them a separate division. Austin, after describing public law as the name given to rights, duties, and capacities of political superiors, ends by including it in his law of persons.[1]

The division into public law and private law is obviously unsubstantial, being founded on the misconception, that the public are not equally concerned in all law, though some rights are more precious than others, and touch some

[1] 2 Aust. Prov. Jur. 775. See Savigny's division, *ante*, p. 50.

individuals more closely than the rest, and though the remedy for their violation differs in its severity of punishment, and in the procedure for working that punishment out.

Distinction of civil and criminal law.—Another division of the law often put forward is that which is called *civil and criminal law.* According to Blackstone and other writers, civil law includes all injuries and rights which concern individuals only, while crimes are public wrongs, and affect the whole community. This is, however, a distinction altogether untenable, because it overlooks the fact that the community consists merely of individuals, and because it is founded only on the means or method of redressing the violation of legal rights. All civil remedies are just as much matter of public concern as criminal remedies, for without both the right would not be made effectual, and the object of both is precisely the same, namely, to secure and protect the right, whatever it may be. The one is often supplementary to the other. The only difference consists in the degree or severity of the punishment imposed, or in the manner of dealing with the author of the violation of the right. The protection of any right can only be secured by the law through the medium of inflicting punishment of some kind for its violation, when such violation actually occurs, for it is the peculiar province of rational beings in the calculation of consequences to frame their conduct so as to avoid doing certain things, because if they do them, a specific disagreeable consequence, called punishment, will follow, whether in the shape of death, imprisonment, fine, or compulsory deprivation of property. Whether the highest or the lowest of these degrees of punishment or consequences follows, depends on the primary right assailed and the manner and extent of the assault; but all this, being only machinery, is subordinate to the one thing in view, namely, the preservation and protection of that right. Thus, if my body is injured, this injury may be of all degrees from extinction of my life down to the smallest interference with my person of which the law takes cognisance, and for which any redress at all will be given. If my life is destroyed, the consequence to the offender may be capital punishment or imprisonment. If my person is

wounded or injured to some serious extent short of death, the punishment will be imprisonment or fine of the person who wounded or assaulted me. If, again, my person be merely touched, or assaulted, or beaten, to the very smallest extent cognisable by the law, there may be no imprisonment, but merely a payment to me individually of a sum of money in the name of damages. In the two former cases the offence is called a crime, and the punishment is called a criminal punishment, and the control over the enforcement of such punishment is not left entirely to the person injured; while in the last case the offence is called a mere civil injury, and the punishment is called a sum of damages awarded to me for my own use, and the enforcement of which is left entirely to my individual discretion.

But whatever be the degree of injury to my person, and whatever be the degree or mode of punishment or redress for such injury, they are all mere modes of protecting the primary right which I have to the security of my person. The great object of the law in all the cases is to secure that primary right, for it is deemed to be the surest way of preventing invasions of that right to proportion the punishment as nearly as possible to the violence or degree of the attack. And on this view Pratt, C. J., observed that damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.[1]

[1] Wilkes *v* Wood, 19 St. Tr. 1167.

On this subject DUMONT justly remarks that "the civil code is at bottom only the penal code under another aspect: it is not possible to understand the one without understanding the other. To commit an offence is, on the one hand, to violate an obligation, on the other hand a right. To commit a private offence is to violate an obligation due to an individual—a right which he has over us. To commit a public offence is to violate an obligation due to the public—a right which the public have over us. Civil law is therefore only penal law considered under another aspect. If I consider the law, at the moment it confers a right or imposes an obligation, I consider it in a civil point of view. If I consider the law in its sanctions, in its effects, with respect to a violated right or broken obligation, I consider it in a penal point of view."—1 *Benth. Works*, 299.

LORD KAIMES said criminal law was of later growth than civil law. GUIZOT says that all barbarians begin with a penal code which

Distinction of criminal law useful only for practical purposes.—Yet so much consequence has often been attributed by legal writers to the means or method of protecting the person and property against the more violent offences and misdeeds, that they are singled out as a class by themselves and called crimes, chiefly because the mode of procedure and the mode of punishment are different; while as regards the lowest and most trivial of those assaults, they are called merely civil injuries, and are redressed by an action at law. The distinction between civil and criminal law is thus founded merely on the procedure by which the violation of the right is redressed, and on nothing else. It is true some rules of that procedure lie so deep and are so interwoven with the most tender of all the liberties of the subject, that though the division is altogether subordinate, and not primary, yet the incidents surrounding the course of procedure are of the first importance. The law shows its sense of the distinction between the degrees of misconduct involved in the criminal and the civil acts respectively by attaching a severe and degrading punishment to the former, and entrusting the prosecution, at

gradually changes into a civil code in many of its parts.—2 *Guizot, Civ. Fr.* Lect. 9.

BLACKSTONE admitted that the criminal law in his time was in a more crude state than the civil law.

It may be said that all law is at first civil law, that is to say, all offences and wrongs are mere matters of money between the two parties. The notion of singling out some offences and saying that they are too serious to be bargained over and left to the sole disposal of the two parties affected, and of insisting on a fine in respect of these being paid to the king, or some bodily punishment separately inflicted on the wrongdoer as an example or deterrent, is of later origin, and arises, after long experience, when the power of drawing nice distinctions and when habits of reflection have been acquired. The criminal law is thus a product of a civilisation considerably more advanced than the civil law, and is merely a selection or classification of the wrongs for a separate treatment and more strictly personal punishment. In the Chinese code the distinction between civil and criminal law was said to be unknown, and all wrongs and causes of action were treated criminally.—*Staunton's Chin. Code*, 360. It was the same in the kingdom of Siam.—3 *Univ. Mod. Hist.*, 345. In the laws of Zoroaster all violations of law were treated as crimes, and there was nothing corresponding to civil law; a refusal to pay a debt was equivalent to larceny, and punished accordingly.—*D'Anquet. Zend Avesta.*

least nominally, to the crown; while as regards a civil injury, it is entirely an affair of money between the parties, and if they choose to settle or compromise their differences, no other person can interfere to prevent them. It is, indeed, a common, though incorrect, expression that the one kind of injury concerns the public and the other merely concerns the individual. The correct view is that both concern the public, and both concern the individual, though in different degrees. The distinction is not sufficiently broad and clear to found a separate division of the law in any methodical treatise, though it is a conspicuous part of practice relating to the defence of nearly all rights.

Distinction of commercial law.—Sometimes the name of commercial law is used to denote a division of the law which, as the name imports, includes those portions of law specially affecting merchants and traders. But this is nothing but a fanciful and arbitrary distinction. To select a few chapters of the law of contracts may be convenient and useful, but cannot offer more or less than a fragment of a complete subject, and that is best considered in its own place under the more general title of "The security of contract and business," or such other divisions as include what most interests those engaged in commerce. Such a distinction as commercial law requires no further notice here.

Distinction of the law of nations.—While municipal law is the law which binds the citizens of one nation together and governs their conduct *inter se*, there is a branch of law, called the law of nations, which has been used to denote the body of rules observed between two independent nations to regulate their conduct and mutual relations, when the citizens of one country come to be mixed up with the business or concerns of another. And at this stage some distinctions require to be made.

It is found by experience, that there are always members of one nation impelled by business or pleasure to enter the territory of another nation, and settle more or less permanently within its borders, and as the municipal laws of no two nations are the same, some conflict or uncertainty may result as to when and where the line is to be drawn, and under which government these wanderers must range

themselves. By their transition from one country to another the rights and duties of citizenship cannot be wholly escaped, though to determine which is which at any particular moment may often be a question of nicety, but to the solution of which, nevertheless, all municipal communities must address themselves. It is on this account that one of the great divisions of municipal law already noticed is called "The security of foreigners."

Relations between nation and nation in peace and war.—When a nation has its own municipal laws, its own government and legislature, and owes no allegiance as an inferior to any other nation or government, there are two sets of conditions under which it may be brought into contact with the citizens of other nations. There may be war or peace. The two nations may deal with each other collectively, where the government of each is represented by an ambassador, and all that passes is official and of national importance. Or the citizen of one nation may deal with the citizen of the other nation individually and without the intervention on either side of any national or official organ.

Thus as between nation and nation there are certain rules more or less definite, which each observes towards the other in time of war. Such are the forms of giving a preliminary notice of war, and the manner of declaring it, the degree of protection to enemy's property, or its confiscation if found within the other country—the circumstances which lead to the imposing of embargoes and the issuing of letters of marque and reprisal, and the encouragement of privateering—the mode of dealing with the enemy's property if found on the high seas, and of dealing with neutrals sailing under the flag and pass of an enemy—the mode of carrying on war, and the use of fair and lawful weapons and stratagems in its prosecution—the treatment of prisoners taken in war—the mode of ascertaining the rights of capture of prizes at sea—of dealing with interference from neutral nations, and the rights and duties affecting passports, truces, and treaties of peace. These and numerous other details form the subjects of attention and cognisance on the part of governments representing nations, and have been reduced to a system or code somewhat resembling the municipal law of the nation

itself, though necessarily confined to a limited range of subjects.

Then again in time of peace there are certain rules of courtesy and business which require to be observed between nation and nation, for no nation can now be so wholly isolated from the others, that relations of some peaceable kind do not spring up and assume a settled condition between the citizens of both. Thus the rights and privileges of ambassadors and consuls, the rights arising out of commercial intercourse, out of the mutual disposition to arrest and deliver over to trial and punishment fugitive criminals, the rights of passage across navigable rivers and seas, or across land, require to be adjusted according to certain notions of justice and courtesy, such as distinguish the relations of individuals equally independent and equally ready to appreciate the independence of others.

Relations between individuals of different nations.—But though the general conditions of peace and war suggest an obvious foundation for broad distinctions in regulating the intercourse between nations when each is represented by its own government respectively, and every act is more or less official, there are many personal circumstances of a less public character which vitally affect the *status* and relations of individual subjects of one nation while living temporarily or permanently within the territory of another nation. These do not attain the dignity of involving consequences yielding the alternative of peace or war, and yet hundreds and thousands of individuals may be vitally affected in their rights and liberties, in their persons and property, according to the view which one nation or its courts and legislature may take of their legal rights at a particular conjuncture. Thus an individual acting under the irrepressible instincts of business or pleasure may, when in a foreign state, come into collision in many points with the law of that state. He may have been married or divorced in his own country and have children born there; he may have property in either country, or both; he may have entered into contracts and covenants binding in the country where made, but to be performed, if at all, in another country, not then contemplated by either of the parties affected. He may die in the foreign country, leaving property in all parts of the world. His wife or

wives may have been divorced in one country, and he may have married again in another: his children may be left unprotected, his will may be formal according to the law of one country, and informal according to the law of another; his rights may be complicated by every conceivable variety of time and place. In these circumstances, as the law of one or other country must be held to afford the appropriate solution for each emergency, it is of consequence that each nation, legislature, or court should arrive at some leading principles, and these, if possible, of general application, so as to avoid the uncertainty, loss, or confiscation that might otherwise befall innocent individuals. These rules, whatever they be, form a part of international law, which has been by Foucher and others termed Private International Law. The questions that arise and must be solved are not of sufficient national importance to attract the notice of the executive government or to engage the offices of diplomacy. They are part of the usual business of the world, and fall to be solved by each municipal court, which for that purpose supplies from its own ordinary machinery the appropriate remedy. The municipal law merely suffers such variations as the extended views and reasonings founded on the comity of nations suggest. It thus necessarily contains, as part and parcel of its own procedure, sufficient rules to govern the rights of all those persons, who, by birth or otherwise, could never be deemed in any view parties to the mysterious original contract which binds the governed and the governor.

Private international law.—Thus private international law is in reality not at all different from the municipal law, and is enforced in the same way; it forms, in effect, part of the municipal law, the only difference being, that, in all questions that arise, one of the parties, or it may be both, were, or are, citizens of another country. This circumstance is, however, sufficiently frequent and important to pervade nearly all the departments of substantive law in every municipal code, and on that account, as it forms a variation running through all the other divisions, it is in the previous systematic arrangement treated as of itself a separate division of the law. This is, however, merely because different principles and rules require to be applied

when the peculiarity of foreign nationality pervades the subject-matter. This division, as already stated, has been called the security of foreigners, but it in reality nearly coincides with what modern jurists have often described as private international law.

Public international law.—The other part of the law of nations, which has been called public international law, and is a voluminous code in itself, differs in three most vital particulars from what constitutes the municipal law of a country. When one speaks of the municipal law, there are necessarily implied three essential characteristics of that law. 1. That there is a recognised organ of legislation to alter any part of that law, and adapt it to the varying circumstances and situations which arise. 2. That there is implied, secondly, a recognised court or tribunal to settle authoritatively the meaning of that law and its application to the circumstances of each individual case. 3. And thirdly, there is implied a definite and recognised mode of enforcing the decisions of such tribunal by the appropriate executive machinery, involving such punishment as courts can inflict. In all and each of these three vital characteristics that part of the law of nations called public international law is altogether deficient, so that to call it a law at all is rather a figure of speech than a correct use of technical language. It is a law only in the sense in which the code of honour or the code of morals, or religion, or any other rule of conduct is a law, being a collection of self-imposed rules and maxims drawn up in imitation of municipal laws, and so as to adapt the spirit and essence of that law, and of the rules of morality which underlie all law, to the circumstances and conduct of two independent and irresponsible powers, acknowledging no common superior, and therefore not subject to any compulsory enforcement of the will of each other.

It may be asked how it is that such a code of law as this arises and acquires respect and voluntary obedience, so that though no nation is itself bound, or can compel another to give obedience to it, yet if the subject-matter is of sufficient moment, one will go to war with another to enforce it.

How law of nations arises.—It has been said by Montesquieu that the law of nations is founded on the principle, that different nations ought to do to each other as much

good in peace and as little harm in war as possible, without injury to their true interests.[1] This explanation seems to accept as a necessity, what was then probably deemed as inevitable as a law of nature, that war must occasionally occur, and that although it could not be prevented, yet its accompanying evils might be mitigated. But the great thinkers of the world, who constantly discover higher standards of morality, have inculcated the doctrine, that nations are not necessarily natural enemies, that they do not necessarily require to fight with each other over every difference, that brute force and blind chance have not necessarily any close connection with the merits of their quarrel any more than the duels of gladiators or the ordeals of the middle ages—that war, so far from being an inevitable necessity, may yet in the progress of enlightenment come to be treated, like piracy, as the common enemy of human progress. The law of nations in truth arises just as the municipal law of a country arises, from inevitable necessity, for the gravitation of human experience in all ages and circumstances is towards some kind of generalization of the rules of justice and mutual respect, founded on the still more elementary sentiment, that all nations, like men, are equal, and strive to attain equality of advantages in whatever circumstances they are placed. As municipal law springs gradually out of this sentiment between individuals, so a sentiment arises of a like kind between nation and nation. This law of nations, or public international law, is however, not a part of the substantive municipal law. Its sole end and object bring it within the category of administrative law. A nation undertakes wars, not for any benefit inherent in war itself, but as a means to an end—as a means of preserving its own municipal law intact, or enhancing the benefits arising from it, whether these benefits consist in expanding commerce, in enlarging the area of territory, or in manifesting power and resources for deterrent effects. The duty of declaring war and carrying it on, and all the details of public international law with regard to it, thus form part of the business of the executive government, and as such belong to that division of the law already designated "the government."[2]

[1] Montesq. L'Esprit, b. i. c. 3.
[2] "The *jus gentium* and *jus naturale* meant the same thing in Roman

Distinction of the law of nature.—The law of nature, or natural law, is a phrase which constantly occurs in the writings of most jurists and of all political writers, and there is, perhaps, none which is less clearly defined. Some even give to it the importance of a separate division by itself, and talk of the divine law, natural law, international law, and positive law, as the four great divisions. In the great variety of treatment which this kind of law has received, it is impossible to discern any well-defined idea, and it is difficult to avoid the conclusion of Bentham, that its descriptive name is a metaphor and nothing more. Yet it deserves some notice in any work which professes to give a complete outline of any one municipal law, more especially as every writer in turn has attached to it some meaning of his own.

Definitions of the law of nature.—The law of nature was recognised by Plato and Aristotle and Cicero as something differing from the municipal law of each community.[1]

Cicero says, "Law is right reason congruous to nature, pervading all minds, constant, eternal, which calls to duty by its commands, and repels from wrong-doing by its prohibitions, and to the good does not command or forbid in vain, while the evil-disposed are unmoved by its exhortations and warnings. This law cannot be annulled, superseded, or overruled. No senate, no people can loose us from it: no jurist, no interpreter can explain it away. It is not one law at Rome, another at Athens: one at present, another at some future time; but one law, per-

law, though the Romans, by their intercourse with other people, and by comparing their own rules of law with those of foreigners, could not fail to discover those universal principles which prevail in the law of all nations. The term *jus gentium* indicates the accidental mode in which the notion originated, and the *jus naturale* indicates the permanent source which it had in the primary instincts and habits of human beings, who are all formed alike."—*Long's Discourse*, 64.

"Before any systematic treatises were published on public international law, the rules rested on theological casuistry, or on the analogies of positive and local law, or on the loose practice of nations and precedents rather of arms than of reason. Ayala in 1582 and Albericus Gentilis in 1583 and 1589 reduced the whole to order, and they were soon superseded by Grotius in 1625."—2 *Hallam, Lit. Hist.* 179.

[1] Arist. Rhet. i. 13.

petual and immutable, including all nations and all times."[1] Justinian's Institutes describe the law of nature as that which has taught the lower animals as well as man. Modern writers treat the law of nature as almost synonymous with moral law.[2]

Law of nature has no historical basis.—Though some

[1] Cic. De Rep. iii. 22, quoted Lactant. Inst. vi. 8.

[2] The following are some of the definitions of the Law of Nature:—

BURLAMAQUI—Those rules which nature prescribes to man with a view to his true and enduring happiness.

PUFFENDORF—That universal rule of human actions to which every man is obliged to conform as he is a reasonable creature.

RUTHERFORTH—Those rules of moral conduct which mankind in their intercourse with each other are obliged to observe, from their very nature and constitution.

MONTESQUIEU—Those laws anterior to the establishment of society.

DAGGE'S *Crim. Law*—Those laws which every intelligent being is obliged to observe under an unknown penalty for transgressing the prescribed will of that Supreme Being from whom he derives his rational powers.

GROTIUS—The dictate of right reason, whereby any action is morally good or bad, and as such is enjoined or prohibited by God, the author and preserver of nature; *also* the principles of right reason, which enable us to know that a certain action is right or wrong according to its congruity with the reasonable and social nature of man.—*De Jure*, b. i. c. 1, s. 10.

COKE—The moral law written with the finger of God on the heart of man.

KENT—Rules of conduct, the deductions of right reason, and also declared by divine revelation.

FORTESCUE—The truth of justice which is capable of being by right reason revealed.—*De Nat.* b. i. ch. 31.

MILTON—The law of nature is the only law of laws truly, and properly, to all mankind fundamental, the beginning and end of all government.—*Milton, Free Com.*

BOLINGBROKE with Ciceronian eloquence follows Cicero, and says the law of nature is the law of laws.—*Bolingbr. Frag. Ess.* ix. xvi.

The JEWS had different notions of the law of nature from surrounding nations, and did not derive it from customs of nations, but from oral tradition of God's revelation.—3 *Hallam, Lit. Hist.* 146.

The Frederician Code says the first state which man acquires is the state of liberty, for naturally all men are free.—*Fred. Code*, p. i. b. i. tit. 5.

BENTHAM says the expression, *law of nature*, is figurative and metaphorical; it is a metaphor taken from the use given to the same word "law," in the case of political law; it is to that source consequently that we must resort for an explanation of it.—7 *Benth. Works*, 83.

assume, and though the popular notion seems to be, that the law of nature is some law which precedes municipal law, and which continues to form the substratum and the better part of the municipal law after the secondary stage has been entered upon, the ready answer is, that such a theory is opposed to facts. There is not and never was any other law than municipal law known and familiar to any society, however rude. The two conditions, if there are two, are simultaneous and correlative. Municipal law is to each community the sum of all laws and all customs, whencesoever derived. Yet not unfrequently one hears appeals made to the law of nature, as if in some anterior and barbaric state, or in some golden age,[1] each nation once possessed a better law than the municipal law, and as if the rudiments of a purer law can be found by reverting to those early times. Nothing is more fallacious than this. The further back we go in the history of any of the existing civilised nations, the less we find of the rudiments of municipal law, and the fewer of those features which form the pride and glory of present times. He who reads Tacitus and Cæsar for the early condition of the British and German races, and the various travellers who have seen and described tribes still more barbaric in all parts of the world, will find scarcely a trace of the leading doctrines and maxims of modern municipal law.[2] With such tribes and races, marriage, or what corresponded to it, was neither a contract, nor a religious rite, nor even a personal association of any kind. Fraud and plunder were often viewed as masterly displays of genius, worthy to be applauded. Chastity was not only repudiated, but its absence was often a positive merit, or even an indispensable duty. Public worship had nothing but the semblance of some fiendish and malignant murder of innocent and blameless victims, to propitiate an unknown and an unappeasable demon. All the finer feelings, which flow from the exercise of our highest faculties, from thought, speech, benevolence, piety,

[1] TACITUS says the first race of men lived free from crime and without chastisement or restraint.—*Tacit. Ann.* b. iii. c. 26.

[2] PITT said, in 1792, "We were once as obscure among the nations of the earth, as savage in our manners, as debased in our morals, as degraded in our understandings, as the African race was then." —29 *Parl. Hist.* 1157.

enthusiasm, and which now give the relish to life, were unknown and unattainable. Man was a mere tool of appetite and lust; the converse of the normal man of civilisation. Nothing upon which an enlightened modern nation most values itself, whether relating to the security of the person, or of property, of marriage, public worship, free thought and speech, fair trial, legislation, or government, can be traced satisfactorily in the dark history of the ages anterior as well as long posterior to the Christian era. Here and there enlightened saws and maxims are found in circulation, but these shine like meteors, and play no well-defined part in the surrounding system of society. If it were not for the Roman law of contracts, which was well and skilfully matured, the modern lawyer can point to no firm landmark or territory conquered from the waste of centuries, on which his eye can rest complacently. If there was a law of nature or a standard law antecedent to its deteriorated varieties, then no nation seems to have attained to an accurate knowledge of it, and Cicero's and Bolingbroke's glowing appeals seem to point only to a land of shadows, and to be little else than flourishes of rhetoric.

On what basis the law of nature rests.—So little can a definite meaning be attached to the current allusions to the law of nature, that few or no rights turn upon it, and it seems little more than a point for declamation. It is nothing but the analysis which the municipal law of all nations cannot fail to undergo in the thoughts of intelligent citizens. It is only the shadow of the concrete substance. Every person, in testing and working out the municipal law, sees instinctively that its rules are all essentially general in their application, are independent of personal peculiarities and accidental circumstances. Every one endowed with reflection knows and feels, that his legal rights and wrongs do not depend on the colour of his hair,[1] his name, the number of his friends, his age, his wealth, his temper, his stature, or his personal appearance. When the municipal law is stripped of all the

[1] This must be qualified by the recollection that the ancient Egyptians used to kill their red-haired people.—*Montesq.* b. xv. ch. 5. And a Brahmin was forbidden to marry a red-haired girl.—7 *W. Jones*, 154.

adventitious things which often adhere to it, the residuum is the law of nature. It is the skeleton of the municipal law, and the skeleton of one municipal law differs from that of other municipal laws as much as, but not more than, the types of face and head of one race from another. There is no advantage, therefore, in dwelling further on the law of nature, for it can never form any satisfactory basis for a separate division of the municipal law, or even for a standard of comparison. The standard nowhere exists: it is only the echo of every one's independent reflections on the actual law in force for the time being.[1]

Distinction of law as malum in se and malum prohibitum.—Somewhat akin to the subject of the law of nature is a distinction current among jurists and writers on international law between a thing which is *malum in se* and *malum prohibitum.* By this is generally indicated that one thing is wrong and wicked in itself, and another thing is not wrong in itself, but is wrong only because, and to the extent within which, the municipal law has prohibited

[1] The law of nature has often been said by writers to be part of the law of England.—*Calvin's Case*, 7 Rep. 4, 6. Even in a recent case, a judge, professing to follow Blackstone, said the law of England was said to be founded on the law of nature and the revealed will of God.—*Per Best*, J., Forbes *v* Cochrane, 2 B. & C. 471. The lords, who in 1772 protested against the Royal Marriage Act, relied much on the argument, that it was against the law of nature, which they said no civil law can take away.—2 *Rogers's Protests*, 124. The law of nature is by some called the law of reason, which perhaps seems a more befitting name.—*Doct. & St.* i. c. 2.

FILANGIERI said : "The law of nature is inseparable from the nature of thinking beings, that it subsisted and would subsist for ever, in defiance of the passions which distract it, the tyrants and impostors who would obliterate or annihilate it in blood and superstition."—*Filang. Sci. d. Legisl.* ch. 4.

ADAM SMITH, one of the great original thinkers of his time, says : "It might have been expected that the reasonings of lawyers upon the different imperfections and improvements of the laws of different countries should have given occasion to an inquiry into what were the natural rules of justice, independent of all positive institution."—*A. Smith's Theory*, p. 6, s. 4. It appears that Smith intended himself to prepare such a work; but it was unfortunately never accomplished.—*A. Smith's Life.*

BURKE said Domat, one of the greatest French lawyers, laid it down, that the doctrine of prescription of crime was part of the law of nature. And this was obviously founded on the current misconception, that there was a law of nature as a distinct code.

it. Thus, murder and larceny would be deemed *mala in se*, because they are said to be prohibited by the moral law, or the law of nature, in all countries and times;[1] while other things, such as killing game without paying for a licence, issuing a bill of exchange without a stamp, importing goods without paying duty, building a house beyond the line of street without a licence, are *mala prohibita*, because, though one country enforces them, many countries do not. The distinction is further explained by saying that an offence which is *malum in se* is intrinsically immoral and illegal, while *malum prohibitum* is not so, for that there is given an alternative to each person in the latter class of laws, allowing him at discretion to do the prohibited thing, if he is willing to pay the penalty, or accept the punishment as its equivalent. The view is said to be, that the violator of the law is discharged, when he chooses either of the alternatives, and owes no duty to the state beyond accepting one of them. And this last was the view of Blackstone.

If this distinction is well founded.—But to draw such a distinction is not only immoral in itself, but is a misapprehension of the whole scope of the law. The municipal law does not adopt and enforce the moral law or the divine law merely because it is divine, but because the general security and the object of civil government cannot be attained without so enforcing it, or a part of it. The very same is the reason of *mala prohibita*; the only difference lies in the degree of importance of each specific law. The violation of one law is deemed of less consequence than the violation of another. The moral turpitude is very different, and all communities in all stages of civilisation must recognise degrees of importance and merit in the obedience to the laws. But in each and every instance of an offence whether *malum in se* or *malum prohibitum*, there is and can be no option given or intended to

[1] VAUGHAN, C. J., who discussed this subject in reference to the dispensing power of the king, says: "Murder, adultery, stealing, incest, sacrilege, extortion, perjury, trespass, and many other of the like kind, all men will agree to be *mala in se*." And he says, "those things are *mala in se* which can never be made lawful even by statute."—*Vaugh. Rep.* 330. But there is no more definite line drawn.

be given to any individual to make his election between violation of law, or paying the penalty assigned to such violation. In all cases the law intends and desires that there should be no violation of any kind, however unimportant, and the sole reason why the same penalty, the same amends, the same remedy or punishment, is not apportioned to each is, that the punishment is deemed in each case just a sufficient check or counterpoise, and no more, against such violation. The distinction is not one of principle, but only one of degree, for civil wrongs and criminal offences are subject alike to this treatment. To found any distinction upon an option being given in the one case and not in the other, is obviously untenable, is fraught with mischief, and saps the foundation of morality itself. A sound morality revolts altogether against the conduct of the man who walked through the streets of ancient Rome boxing on the ears everybody he met, and then ordering his servant, who followed with a bag of money, to recompence each victim of his wanton insolence with twenty-five pence, according to the tariff of the Twelve Tables.[1] Such conduct was in the eye of the law immoral, even if it were competent, as certainly in our law it is not competent, for any offender to be able to appraise the exact sum required to atone for his delinquency. Epicurus saw this distinction clearly, for his saying was, that from the moment a thing, declared just by the law, was recognised as useful for the mutual relations of men, it became really just, whether it was universally regarded as just or not.[2]

It is true there are a few laws so framed as to present an option to the individual to do one of two or three things; either of which the law accepts as an equivalent of the others; but this is because the option is part of the essence and substance of the particular law, and is expressly or impliedly so declared by its very language. Thus, by the Militia Act of Charles II. a man charged to serve as a horse or foot soldier might discharge his obligation by finding a substitute.[3] And a similar option is also given by the modern militia law. But though a violation of the moral law may be no violation of the municipal law, a violation of the municipal law can never fail to be a

[1] Aul. Gell. b. 20, c. 1.
[2] Diog. Laert. Epic.
[3] 14 Ch. II. c. 3, § 24.

violation of the moral law, so long as the lesson is inculcated to all Christians to render unto Cæsar the things that are Cæsar's; and all those who are satisfied with the theory of divine right cannot escape from the conclusion, that little sins are not the less sinful for their littleness.

The distinction of *malum in se* is usually said, or assumed, to be founded on the law of nature or morality, which in all countries marks out offences into classes as clearly as the eternal distinction between right and wrong. But it must be remembered that the test of right and wrong, eternal though it be, is not the same in different countries, and wholly fails in the stages of barbarism. Among tribes, and even among nations, at least those that are ancient, there is scarcely a point in the Decalogue which does not find its converse acknowledged as orthodox. It is probable that larceny was the earliest offence defined in any society; murder is of later origin; and when adultery and witchcraft are added, it is difficult to identify other crimes as essential crimes, and of these witchcraft is wholly erased from modern codes.

Nor does the distinction of *malum in se* and *malum prohibitum* derive the least support from the practice of martyrs and nonconformists, whose conscience has been so shocked by a particular law that they have openly encountered all the risks of wilfully disobeying it. Marcus Antoninus says approvingly, that when Socrates was ordered to apprehend the innocent Salominian, he gallantly disobeyed at all hazards the unjust command;[1] and this conduct was worthy of one whom the Fathers called a Christian before Christ. History in its noblest passages recounts instances of martyrs braving cruel deaths, and resisting, if not defying, the whole power of the civil government in all its stages and in all its consequences, rather than yield it their obedience, and such a supreme moment has happened more frequently than it is ever likely to happen again. These martyrs did not confront death merely because some obnoxious law turned on *malum in se* or *malum prohibitum*. They did so because, taught by a higher and diviner law, they were satisfied that the municipal law had blundered in maintaining some bloodthirsty, impious, and tyrannical punishments, which created an open conflict between self-

[1] M. Anton., b. vii. ch. 60. Plato Apol.

interest and duty, and exposed its subjects to some cruel alternative. And though it was not to be expected their contemporaries in the social contract should openly excuse them, yet the more enlightened and impartial conscience of posterity has done justice to their sagacity and high standard of right by canonising their bones. Though martyrs themselves may at times err, they have also frequently been in the right. All legislatures have erred once and again in binding burdens too heavy to bear; for mistakes are incidental to legislatures as well as to individuals.[1]

So long as the distinction of *malum in se* is used in international law, as denoting some of the blackest crimes which are marked out for universal detestation in the family of civilised nations, such distinction may be convenient, but it is not founded in any clear principle sufficient to challenge any importance in a systematic treatment of the municipal law.[2]

Distinction of the divine law.—The law of God is sometimes also appealed to by jurists and writers as a part of the substantive municipal law, or at least a source of part

[1] Fox said " in this country we were governed by king, lords, and commons, but no man would contend that any of those powers was infallible."—29 *Parl. Hist.* 1374.

[2] The distinction of *malum in se* and *malum prohibitum* was said by Bentham to be at best obscure.—1 *Benth. Works*, 193; and by Austin, one that leads to nothing.—2 *Aust. Jur.*, 264.

The distinction was used in colonial law, where things *mala in se* accepted in the law of the colony were deemed blotted out, as against the law of the conquering country. But the distinction only resolves itself into the question whether one law is repugnant to the other: in short, the word *malum in se* is used only vaguely as denoting that the offence is morally bad.—Blanckard *v* Galdy, 2 Salk. 411; *Anon*, 2 P. Wms. 75; R. *v* Picton, 30 St. Tr. 906, 907; R *v* Macclesfield, 16 St. Tr. 1146.

Lord Thurlow said the distinction of an act not being *malum in se* could not be listened to, if the law has prohibited the thing to be done.—Hanington *v* Du Chastel, 2 Swanst. 159 n.

" I do not know of any crime being punished because of its being *malum in se*."—*Per L. Ellenborough*, 28 St. Tr. 401.

Foster used the word *malum in se* loosely to distinguish revenue offences from other offences, in cases of striking in anger or from malice.—*Foster's Disc.* ii. ch. 1.

Abbott, C. J., said the court was bound to consider every act to be unlawful, which the law has prohibited to be done.—Cannan *v* Bryce, 3 B. & Ald. 179.

of that law. Some old writers seem to treat it as the main source, and eminent judges, even of modern times, have encouraged that mode of speech. The connection between the municipal law of all countries and the divine law is marked by some peculiar features not easily explained, and the subject is interesting to all who choose to reflect.

Ancient codes professing a divine origin.—Milton expressed no new idea when he said, that all the ancient lawgivers were either truly inspired, as Moses, or were such men as, with authority enough, might give it out to be so, as Minos, Lycurgus, Numa, because they wisely forethought that men would never quietly submit to such a discipline as had not more of God's hand in it than man's.[1] And at a later day it was said,[2] to the same effect, that most of the ancient lawgivers and institutors of civil policy, having found it necessary for the carrying on their respective establishments to pretend to inspiration and the extraordinary assistance of some god, unavoidably mingled and confounded civil and religious interests with one another, so as to animadvert on actions not only as crimes against the state, but as sins against that god who patronised the foundation.[3] And Homer says the things that kings receive from Jove are not engines for taking towns, or ships with brazen beaks, but law and justice; these they are to keep.[4]

[1] Milton, Reas. Ch. Gov. [2] 4 Warburton, W. 43.

[3] BISHOP WARBURTON collects (*Divine Legation of Moses*, b. ii. s. 2) references to the ancients and to the Chinese, Peruvian, Gothic, and Mohammedan codes. DIODORUS SICULUS said the old legislators did this, "not only to beget a veneration of their laws, but likewise to establish the opinion of the superintendency of the gods over Roman affairs."—*Diod. Sic.* b. i. PLATO also says at the outset of his treatise on laws, "that legislation came from the gods."—*De Leg.* b. i. s. 1; and that it was so in Athens, Crete, and Lacedæmon. HERODOTUS says Lycurgus got his laws direct from the Pythian oracle.—*Herod.* b. 1. And PLUTARCH says he got them from Apollo, while Minos got his from Jupiter.—*Plut. Lycurg.* Not only the laws, but even the Court of Areopagus was deemed by the Athenians to be of divine origin, or, at all events, so ancient that its origin was unknown.—1 *Thirlwall's Greece*, 345; *Plut. Pericl.* The ancient Egyptians also thought the gods dictated their laws.—2 *Wilk. Anc. Egyp.* ch. 8. The laws of Upland, a Swedish code of 1295, purported to have a divine sanction.—6 *Pink. Voy.* 521.

[4] Hom. Il. b. i. 231. "The primitive Christians derived the institutions of civil government, not from the consent of the people, but from the decrees of Heaven. Every usurper, when holding the

The prevalence of the belief in the divine origin of their municipal laws either accounts for or is closely connected with the extraordinary reluctance of some nations to change their laws, which is only another phase of a belief in their superiority.[1]

And to the same tendency of the human mind may be ascribed the belief in barbarous tribes as to their original right to their own soil.[2]

sceptre, was deemed a vicegerent of the Deity."—*Gibbon, Rom. Emp.* ch. xx. The Incas always gave out, that any new law they issued had been originally sketched out, though not put in a detailed form, by the first of the Incas, in order to give greater authority to what they enjoined.—*Com. of Incas*, b. ii. ch. ix. And they attributed their immunity from crime chiefly to the belief that the laws were made by the sun, and therefore divine.—*Ib.* b. ii. ch. xiii.

[1] So great was the aversion of the Locrians to any new law, that the man who ventured to propose one appeared in public with a rope round his neck, which was at once tightened if he failed to convince the assembly of his improvement.—*Demosth. cont. Timoc.*, p. 744; *Polyb.* xii. 10. And the same was said of the Thurians and the laws of Zaleucus and Charondas.—*Diod. Sic.* Solon was more liberal, but the Athenians themselves punished those who proposed a new law inconsistent with existing laws, forgetting that it was the very object of a new law to be so far inconsistent.—"Paronomon," *Smith's Dict.* The peasants of Livonia were so infatuated in favour of their old laws that they besought the king of Poland not to substitute a milder punishment for the old one, which was whipping till the blood flowed.—13 *Univ. Mod. Hist.* 125.

The laws of the Medes and Persians had the reputation among the ancients of "altering not."—*Dan.* vi. 12.

In Japan it was said any functionary, however exalted, who attempted an innovation, was reported to headquarters and capitally executed. And in the supreme council he, who proposed an alteration which was rejected, was requested to disembowel himself as a matter of course.—*Perry's Japan. Exped.* i. 16, 17.

In China, where the laws were unchangeable, it was recorded as a fearful and wonderful example of innovation, that the Emperor Venti had once abolished the rule, which required that in punishing a criminal his whole family and relatives must be involved in one and the same common ruin with him.—*Du Halde's China.*

[2] In all the countries boasting of the earliest civilisation the belief of the nation attributed to itself the immemorial possession of its own soil, and to its progenitors or to the gods the invention of the arts and sciences. Egypt seems in antiquity of civilisation to have surpassed India and China, Babylon and Assyria.—*Lepsius, Chron. der Egypt. Gen.* xiv. 1. From Egypt civilisation passed to Greece, thence to Rome, and thence to the western nations. The Athenians wore grasshoppers in their hair, in testimony of this

There are traces of a kindred spirit in the law of England. Fortescue, in discoursing on the origin of our customs, says they are the most venerable in the world for their antiquity, and therefore they are good.[1] And Popham, C. J., gravely propounded the view that the laws of England had continued unchanged through all the vicissitudes of Roman, Danish, Saxon, and Norman sway. And Coke surpasses these speculations in his extravagance.[2] Later and more critical eyes have come to other conclusions. The English common law was chiefly based on the Roman law, and Bracton scarcely introduces a new principle not found there.[3] The compiler of the laws of Henry I. evidently had before him a copy of the Theodosian Code, or the Breviarium.[4] The Summary of Roman Law, by Vacarius, who was Professor of Civil Law at Oxford in 1149, became well known to the English judges and lawyers of the time.[5] And Edward I., on his way to the Holy Land, attended and admired Accursius, whom he invited to England.[6]

Though all the facts of history contradict the theory, that every chapter and verse of a law giving remedies for all the wrongs that can happen, must have been elaborated by

notion. Many ancient nations had a tradition of some foreigner or messenger from heaven having instructed them—Prometheus, Triptolemus, Cadmus. The Peruvians had a similar tradition about one Mancocapac. Each tribe of American Indians is said to believe itself superior to all others in virtue and humanity. The Indians of Florida believe that the great Spirit brought them from the ground, and that they are its rightful possessors.—1 *Schoolcr. Ind.* 266; 2 *Ibid.* 170, 194.

[1] Fortesc. De Laud. c. 17.

[2] "And here it is worthy of consideration how the laws of England are not derived from any foreign law, either canon, civil, or other, but a special law appropriated to this kingdom, and most accommodate and apt for the good government thereof, under which it hath wonderfully flourished when this law hath been put in due execution; and therefore, as by situation, so by law, it is truly said, —*et penitus toto divisos orbe Britannos.*"—*2d Inst.* 100. And LORD CHANCELLOR COWPER, at a more advanced stage, when he pronounced sentence on Lord Derwentwater, told the latter that he had "attempted to raze the very foundations of a government the best suited in the world to perfect the happiness and support the dignity of human nature."—R. *v* Derwentwater, 15 St. Tr. 797.

[3] 1 Spence, Eq. Jur. 132.

[4] Savigny, tom. i. 102.

[5] 1 Spence, Eq. Jur. 109.

[6] Post, p. 127.

some far-seeing and masterly legislature at a period hid in prehistoric ages, yet there is no more common assumption than this put forward. The Barons of Runnymede pointed to the time before them in order to give emphasis to their demands. Pym and his compeers resolutely contended that all they asked—that each and every article of the Petition of Right—had been included, or at least implied, in older precedents and in Magna Charta. Old statutes also bear reference to this perpetual harking back to some golden age of laws forgotten or disregarded. And yet much of the legislation of the last two centuries has consisted of efforts to undo what had been done before, and to retreat from much untenable ground taken up in error by former legislators.[1]

All these phases of the same fundamental idea tend to show that human nature is so constituted, that one's own lineage, tribe, country, and laws, for some unknown reason, are more warmly appreciated than those of strangers, and that law is often nothing else but a manifestation of wisdom for the time being. It seems to come to this, that wisdom is always divine, by whomsoever spoken, whencesoever derived, and by whomsoever demonstrated. It is known and recognised, when it appears, in all times and situations, and by the most depraved beings, just as at the coming of the Gospel, it was said, sorcerers, acting under some unconscious presentiment, burnt their books.[2]

How far Christianity is part of municipal law.—In connection with the same subject there has long been current in the law of England a doctrine, or dictum, that Christianity is part of the municipal law. The old judges vied with each other in wide and sweeping language on this subject.[3] Coke said that all laws which are contrary

[1] MACKINTOSH observes that both Whig and Tory antiquaries in the seventeenth century agreed in the mistaken notion, that the Saxon government was well ordered, and that through all the changes of the previous six hundred years the same political and legal institutions had existed. They forgot that a government is not framed like a model, but grows out of occasional acts.—1 *Mack. Hist. Eng.* 72.

[2] Acts xix. v. 19.

[3] "Scripture is common law, on which all manner of laws are founded."—*Prisot*, C. J., 24 Hen. VI. Year-Bk. 40. *Per Jermin*, J. (4 St. Tr. 1289—"The law of England is the law of God; it is pure primitive reason, uncorrupted and unpolluted by human

to Christianity cease.[1] And he said torture was contrary to the laws of God; and that the law of weights and measures was grounded on the law of God.[2] Hale, C. J., said, on a trial for blasphemous libel, "To say that religion is a cheat is to destroy the frame of society, and the Christian religion being a part of the constitution, to say that it is an imposture, is to speak against the laws of the land."[3] Lord Raymond, at a later date, repeated the doctrine, but taking care to add a proviso, that the law should not extend to the disputes between learned men on controverted points of religion.[4] Lord Hardwicke recognised a like doctrine.[5] Lord Mansfield said the essential principles of revealed religion are part of the common law.[6] Lord Kenyon again followed the same view, and said the Christian religion is part of the law of the land.[7] Lord Ellenborough, referring to these remarks, said that they showed, that the Christian religion was the law of the land and must be protected as the law.[8] And Blackstone said the same.[9] And Lord Eldon said the same when dealing with the right of Dissenters as to a charity.[10] The same judge said the court would not protect copyright in a book which contradicted the Scriptures.[11] These views led Lord Eldon to refuse to recognise copyright in Byron's "Cain," and "Don Juan," also in "Wat Tyler,"[12] and to disclose views as to the relations between courts of law and the press not since acquiesced in.

Though it is thus said on high authority, that Christianity, or the law of God, is part of the law of England, it is obvious, that all that is meant is something very different

humours or human corruptions, wits, or wills." *Per Keble* (4 St. Tr. 1307) "The law of God is the law of England; so is the law of reason."—*Ib.* 5 St. Tr. 172. "Whatsoever is not consonant to the law of God in Scripture is not the law of England. The laws of England are purely the laws of God.—*Ib.* 5 St. Tr. 238. "We have no law practised in this land, but is the law of God."—*Ibid.*

[1] Calvin's Case, 7 Rep. 17. [2] 2 Inst. 41. [3] Taylor's Case, 1 Ventr. 293; 3 Keb. 607. [4] R. *v* Woolston, 2 Str. 832. [5] De Costa *v* De Vaz, 2 Swanst. 490. [6] 2 Camp. C. JJs. 513; 16 Parl. Hist. 319. [7] Williams's Case, 26 St. Tr. 704; Woolston's Case, 2 Str. 834. [8] R. *v* Eaton, 31 St. Tr. 950. [9] 4 Bl. Com. 59. [10] Bedford Charity, 2 Swanst. 527; Att. Gen. *v* Pearson, 3 Mer. 399. [11] Laurence *v* Smith, 1 Jac. 474. [12] Southey *v* Sherwood, 2 Mer. 435; Murray *v* Benbow, 1 Jac. 474 n; 7 Campb. Ch. 659.

from what the words imply. Christianity is a system of doctrines, mainly deduced from the Holy Scriptures, intended to influence the conduct of man in all ages and conditions, but in a manner altogether different from that which the municipal law adopts. Christianity does not profess to contain any compulsory methods, or to act with the aid of temporal sanctions. It relies on the future, the distant, and the unseen, rather than the present and the visible. It searches the motives and the feelings, while the municipal law deals almost exclusively with outward acts. But the essential differential quality is this, that the municipal law can and does enforce its rules by sanctions more or less cogent, such sanctions beginning and ending with the present life,[1] while Christianity has no temporal sanctions, and relies on moral and spiritual restraints alone to promote its aims. The domain of the one is far-reaching and infinite: that of the other is limited and temporary. The one fills the mind with thoughts, feelings, and contemplations which influence the conduct in a more durable and effective manner. The other, dealing only with the present, cares little or nothing for the mental state, provided the sanction takes effect—a sanction which only inflicts pain, or deprives the individual of life, property, or liberty. The things also which the one law cares for are petty in comparison with the vast range of the other. As far as the heaven is above the earth, so far is the divine law above the municipal law, or, to quote Fortescue, "as the moon is to the sun, so are human laws to the divine."[2] The aims and objects of municipal law are ephemeral and weak, and often satisfied with mere forms. Life, property, reputation, a fair trial, free speech, a share in self-government, are objects well worthy of being contended for, and the radical idea of the law, namely, impartiality towards all alike, lends a dignity and elevation to its practice. But there are objects greater than these, which can be promoted without the coarse

[1] The ancient laws of Zoroaster seemed to stand out beyond all other laws in boldly pressing its sanctions beyond the present life. The person who broke a contract or told a lie was sentenced to 300 lashes, and the same number of years in hell. And for non-payment of school fees 900 years in hell were added to 900 lashes. —*D'Anq. Zend. Av.* 286.

[2] Fortesc. De Nat. b. i. c. 3.

dissuasives of bodily pain, or compulsory deprivation of property, namely, by reliance only on rewards and gratifications which have no immediate or tangible existence, and feelings which are invisible and incommunicable, yet which irradiate all surrounding conditions and circumstances of life. While the municipal law makes selfishness a science, the divine law, passing from that engrossing pursuit, leads to a higher level, where most of the processes are reversed, the machinery is changed, and a consciousness of dignity and grandeur is acquired which no human law can awaken or command.

Divine law not enforced as municipal law.—When it is said, therefore, that the divine law or Christianity is part of the law of England, this is wandering from the true view. The municipal law does not and cannot, and it would be impious for it to attempt to, enforce most parts of the divine law, and it can only punish in an imperfect manner the violation of a small part of it. Out of the Ten Commandments, which deal with the leading tendencies and proclivities of human nature,[1] not one of them can be enforced by the municipal law, except in the feeble manner of punishing the delinquent after the wickedness has been committed; and even to that slight extent, the sixth and eighth commandments, those aimed against murder and larceny, may be said to be the only commandments which are followed up closely.[2] All the divine commandments

[1] The Siamese, the Buddhists, the Talapoys of Laos, the Banyans and Parsees, and Triptolemus had some golden rules resembling the Ten Commandments.

Jewish writers record that certain short precepts of moral duty, known as the precepts of the sons of Noah were really enjoined by God on the parent of mankind, whether preserved by tradition, or by an innate moral faculty, constantly discerned by mankind. These were prohibitions against idolatry, blasphemy, murder, adultery, theft, rebellion, and cutting a limb from a living animal.—3 *Hallam, Lit. Hist.* 146.

[2] WARBURTON says society, *i.e.* the law, cannot enforce above one-third part of moral duties, and even that third imperfectly. It can punish, but cannot reward.—4 *Warburton, Works*, 33.

PLUTARCH said goodness moves in a larger sphere than justice: the obligations of law and justice reach only to mankind, but kindness and beneficence should be extended to creatures of every species.—*Plut. Cato Cens.*

ARISTOTLE said that philosophy enabled him to do, without being

have a wide and far-reaching effect on the soul and on the secret thoughts, but the municipal law only singles out a few of the most glaring and conspicuous accompaniments of a depraved heart. It cares nothing for murdering the mind and its finer feelings by lies and refined cruelties of speech and writing, but only for murdering the body, for, as Hale says, "Secret things belong to God." Nothing for stealing many of the appliances and cherished mental possessions of another, but only for stealing a few chattels and visible signs of property. The other divine commandments shrink into the very smallest dimensions in the hands of the municipal law. The injunction to worship one God, the prohibition of the worship of graven images, and of taking the name of God in vain, the injunction to keep the Sabbath-day, to honour one's parents, the prohibition of adultery and perjury and covetousness are feebly reflected in the municipal law. Those who recall to mind the place assigned in the latter law to the punishment of blasphemy and profanity, the enactments against working and amusements on the Lord's Day, the poor law statutes as to neglecting to support indigent parents, the partial remedies given in some cases of adultery and perjury, the total blank as to covetousness, will appreciate at a glance how little the divine law can be said to be incorporated in the municipal law of England. The municipal law has no faculties to comprehend the heights and depths of the divine law. The Sermon on the Mount meets with a feeble response or recognition throughout the whole length and breadth of the statutory and common law. When the exigencies of argument and the necessity of devising some means of reckoning loss or damage requires the law to form an ideal for comparison, the highest legal speculation cannot soar above the standard of a reasonably prudent but mostly selfish man, that is to say, a man not indeed inclined to give vent to ungovernable passion, and not unwilling to hear both sides, but nevertheless a man always acting from some prudential consideration—not apt to

commanded, what others did from fear of the laws.—*Diog. Laert. Arist.*

The code of King Alfred begins with a translation of the Ten Commandments, which he uses as the keynote for his own edicts as to the *lex talionis*, &c.—*Anc. Laws Eng.*

make gifts—careful of his money—in no case given to take more care of others than of himself—jealous of his wife's or child's honour, and entitled to kill an adulterer if detected in the act—one bound to carry out his contract, whether wise or unwise, but in many cases only if it be made in writing—one who pays for an indigent parent or child just enough to sustain life—one not bound to feed the hungry or clothe the naked, except only where the destitute is a child of which he has undertaken the custody—one not bound to observe any forms of civility whatever—one entitled to amass as much property as he can, and often to slay any man in the act of robbing him of it—one repudiating all feelings of gratitude[1]—one not bound to do any generous or friendly act, or to risk his life to save another—one entitled to drown his neighbour to save his own life—one entitled to use any species of exaggeration or subterfuge, or meanness, in order to drive a bargain—one entitled in all circumstances, and with little discrimination, to kill another in self-defence—one not restrained in the indulgence of the most odious passions, and vices, envy, malevolence, ingratitude, evil-speaking, lust, and insolence. These and such like infirmities, clinging to the normal man, the law is powerless to restrain, and generally exempts from blame. And though for some collateral inquiries a higher standard is sometimes remembered as being possible, yet such standard seems rather to be viewed as erratic.

Blasphemy as part of municipal law.—These considerations show how far from correct the saying is, that the divine law is part of the law of England. The two laws are essentially diverse; they move in different orbits, and address different sides of the same human nature. The only occasions on which the doctrine prevails is, when cases arise in which a test is required for measuring the

[1] The ancient Persians punished criminally the vice of ingratitude, which seemed to consist in not returning favour for favour.—*Xen. Mem.* b. ii.; *Xenoph. Cyrop.* And a Roman freedman was punishable summarily for ingratitude to his patron.—*Petit.* fol. 51, tit. 8; *Wood's Instit.*

ANACHARSIS, the intelligent foreigner of his day, laughed at Solon for attempting to restrain avarice and injustice by laws, for, like spiders' webs, they would only entangle the poor and weak, and let the rich and powerful escape.—*Plut. Solon.*

liberty of free speech or writing, or of bequeathing property. If any man assails and ridicules some leading doctrines of the divine law, specified in a statute of William III., in such a style as to show that he is not arguing or reasoning honestly, but intends to insult and revile the common faith of the majority of his fellow-subjects, he commits a criminal offence by virtue of such statute.[1] The statute is somewhat vague as to the persons aimed at, yet makes it incumbent to inquire what are the doctrines of the divine law which are thus identified with the religious convictions of the community. It is a cherished sentiment of natural piety, that some thoughts and feelings are too deep for profane and insolent levity, and as private character is protected against the libeller, so it appears to follow that the sacred character of Divine Persons is, so to speak, protected against the blasphemer. Yet all this is not inconsistent with the primary right of all men to utter or publish fair argument and discussion, if done reverently and with measured respect to the feelings of others. And thus it is, that, notwithstanding the statute above mentioned, Christianity cannot be viewed as part of the municipal law any more than all other branches of knowledge or sciences are part of it, when these require examination for some collateral purpose bearing on the liberties and securities of property and of free speech and thought. The unqualified assertion that Christianity is part of the law of England in the natural sense of that expression, tends only to suggest how narrow is the province of the municipal law. In cases of libel, copyright, or bequest, the courts at most require to consider this subject for collateral purposes. And in cases of violent and scurrilous extravagance in discussing the great truths of religion, the court must draw the line where blasphemy begins and fair argument and discussion end.[2] But it may be safely affirmed that nothing in this law substantially interferes with a reverent and careful discussion and expression of opinion on any subject human or divine, so long as it is not done merely to insult and shock the laudable feelings of others.[3] And collateral

[1] 9 & 10 W. III c. 35; 53 Geo. III. c. 160.

[2] R. *v* Waddington, 1 B. & Cr. 27; R. *v* Carlile, 3 B. & Ald. 161.

ERSKINE, in his prosecution of Williams. most powerfully puts

contracts involving the violation of the statute of blasphemy will often for like reasons not be enforced.[1]

The feudal law.—The feudal law was not the distinctive law of any nation, but was rather the law of real property accepted by nearly all European nations from the fifth to the thirteenth centuries. It embodied the settled views and opinions of those times as to the relations between the crown and the subject with respect to the tenure of land, for land was then the most conspicuous subject of property, and war being the chief occupation, or that which was held of most consequence among men, the two things were sought to be used in aid of each other. A compact system of doctrines and practices was then framed, or had grown up into maturity, and gave apparently great satisfaction, owing to its being easily applied and understood. Nothing pleases the barbarian mind so much as what is simple, and does not require the trouble of thinking much or long; and nearly all nations of northern origin accepted the feudal law as a book of their constitution. For five centuries it grew and prospered, and Guizot said that for the tenth century it was necessary, and the only practicable social state of thought.[2] Blackstone conjectures that it was owing to the defencelessness experienced in England, when an invasion from Denmark was apprehended in 1085, that William I. held a great council at Sarum to inquire into

the matter thus, though his language is somewhat beyond the needs of the law: "In a country whose government and constitution rest for their very foundations upon the truths of the Christian religion, a bold, impious, blasphemous, and public renunciation of them must be a high crime and misdemeanor. Of all human beings the poor, among whom such books circulate, stand most in need of the consolations of religion, and the country has the deepest stake in their enjoying it, not only from the protection which it owes them, but because no man can be expected to be faithful to the authority of man who revolts against the government of God."—26 *St. Tr.* 703.

ASHURST, J., can scarcely be said to express the modern law: "Such libels are not only offences to God, but crimes against the laws of the land, and are punishable as such, inasmuch as they tend to destroy those obligations whereby civil society is bound together, and it is upon this ground that the Christian religion constitutes part of the laws of England: but that law without the means of enforcing its precepts would be but a dead letter."—26 *St. Tr.* 716. The prisoner had sentence of imprisonment and hard labour for one year.

[1] Cowan *v* Milburn, L. R. 2 Exc. 230.

[2] Guizot, Eur. Civ. Lect. 4.

the state of the nation, and he soon after directed the great survey called Domesday-book, after which the principal landholders, being sensible of the great advantages of the union and mutual support supplied by the feudal system, voluntarily submitted their lands to military tenure, and did homage and fealty to the king.[1] Hence both sovereign and subject with one consent adopted the popular tenure of the day. So enamoured were the French people about the same time with the new system, that they surrendered their allodial or free lands, so as to hold them from their king as a re-grant.[2]

The feudal system was thus generally accepted in England soon after the Conquest, though the learned have speculated much as to the precise time and manner of its introduction, growth, and general adoption there. Some, indeed, think the feudal system is as old as human nature, and that wherever military conquests have been made, it was and is inevitable that the general should have the chief voice in dividing among his lieutenants, and they among their men in the proportion of their respective ranks, the conquered land and its fruits; and next, that conditions of service should be added so as to mark and rivet the mutual dependence between links of the great chain. Thus the gift of lands for the military service was made by the Roman emperors Severus and Probus.[3] And though in many countries, ancient and modern, something nearly resembling the feudal relation of lord and vassal has been traced, yet, as Hallam and others observe, the exact bond of union is not identical, as in the case of Roman patron and client—the zemindaries of Hindoostan—the timariots of Turkey—the Polish and Russian nobles and their vassals. The manners of the ancient Germans seem a sufficiently satisfactory origin of the feudal system to many—without troubling themselves to think how it was that it occurred to the Germans. And the customs of the different French provinces as digested by Beaumanoir about the year 1283, closely resemble those of England during the same period. Moreover the Assizes of Jerusalem, a body of laws compiled by Godefroy de Bouillon, the newly-elected king, soon after the conquest of Jerusalem in 1099,

[1] Saxon Chronicle, c. 52, c. 58.
[2] 2 Bl. Com. 51.
[3] A.D. 222, 276.

on the advice of the wisest men of all countries, are little else than copies of the customs and usages current in France. All this shows how well adapted the feudal law was to the minds of those who accepted it, and what confidence they all had in its stability.[1]

It is not necessary in this place to enter into any details as to these matters, for such of them as are material belong properly to another division of law, when the tenure of land requires to be treated. It is enough to notice here generally what has come to be the position which the feudal law now occupies as part of the law of England. At the time when that law flourished it embodied nearly all the law that men cared to know, but it has since shrunk into very narrow dimensions, and is relegated to an obscure corner among the things worthy to be only occasionally remembered. Nations are no longer exclusively engrossed with fighting and conquering their neighbours, and have discovered that there are vast fields of enterprise in redressing the wrongs, defects, and oppressions existing under their own internal economy, sufficient to engage the ambition of nobler warriors and more dictatorial dictators than ancient or mediæval times ever produced. Yet as the feudal stamp was so deeply impressed on the land arrangements of England as well as on those of its neighbours, and modern rules still current seem so obscure and so mixed up with its history, a general notice of its purport may be here stated, and it may be stated very briefly.

It is idle to speak of the feudal law as the cause of great mischief to mankind, as it is idle to speak of the evils of infancy or of barbarism. At the time it flourished that law seems to have adequately supplied a satisfactory adjustment of the relations arising out of real property, and as slavery was part of the settled system of society, it was natural that the two ideas should be interwoven in all the arrangements. But when slavery ceased to be accepted by modern nations as a necessary element of society, it followed

[1] 1 Hallam, Mid. Ages, 200; Montesquieu, b. 30, c. 2; 1 Meyer, Inst. Judic. 4; Pinkerton, Origin of Goths, 139; Robertson's Ch. V. Stuart's Soc. in Europe; Barrington's Anc. St. 439; 2 Bl. Com. 48.

Guizot prefers the derivation of the word feud from *fe* and *od*, a property given in recompense by way of pay or reward.—3 *Guiz. Civ. Fr.* Lec. 12.

that most of this complicated web required to be unwoven piece by piece, till the fatal thread was withdrawn. The texture may have been irretrievably damaged by this abstraction, but according to modern views of the object of all laws, we have ceased as entirely to think of reverting for our instruction and guidance to feudal times, as we do of reverting to the Saxon heptarchy, or the practices of the rude tribes described by Tacitus and Cæsar.

Theory on which the feudal law was founded.—The radical theory of the feudal law was this, that the king is the universal lord and original proprietor of all the lands in his kingdom, and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him to be held upon feudal services. And the moving cause for the crown granting, and for each crown vassal making smaller grants to his sub-vassals, was, that each might, as occasion required, render military service, and follow his lord both at home and abroad wherever the demon of war beckoned them. To ratify this bond, the oath of fealty was taken by the vassal or holder of each allotment, or feud, fief, or fee, as it was called. And when the vassal violated his oath by not performing the stipulated service, or by deserting the lord in battle, the lands again reverted to him who granted them. Both parties thus closely connected, the lord and his vassal, were mutually bound to protect their respective possessions, and thus a complete network of common interests and correlative support covered the kingdom.[1] When the vassal obtained a grant, he knelt before his lord and did homage in presence of other vassals, and received a typical delivery of the land, and became bound to attend the local court of the lord, who assumed judicial power of life and death over all within his barony. The land was held sometimes on the precarious tenure of the lord's will, sometimes the tenant's interest was for a year certain, sometimes for life, sometimes for the son and the heirs of the vassal, and

[1] GUIZOT observes justly: "It is often said that the feudal system connected by indissoluble links the whole of society. This is a pure theory. In fact, the greater number of feudal lords were completely independent of the sovereign; a great number had scarcely heard the name of monarchy, and had few if any relations with it." —*Guizot, Eur. Civ.* Lect. 9.

sometimes for the alienees or assigns.[1] In each phase some slavish accompaniment was fixed upon, such as fines, reliefs, and other exactions, under the pretence of obtaining the lord's consent or sanction to everything which the vassal did. The habit of dictation on the one hand, and obedience on the other, engendered by so close a connection in barbarous times, soon produced its natural fruit; and the stronger party gradually imposed on the weaker party more and more conditions and services, and these more or less oppressive to the vassal, so that the irksomeness of the whole soon began to be felt and complained of during the three first reigns of the Conquest. This in turn, however, was not unaccompanied by some compensating advantage, for it led Henry I. to promise a restoration of the laws of Edward the Confessor, and to grant a charter, which was the foundation of that celebrated Magna Charta extorted at Runnymede from John and confirmed by Henry III., and which marked so important an epoch in the law. The mutuality of feudal services accustomed kings to consult with their chief subjects. It was especially fortunate for England that the feudal laws fostered a spirit of turbulence and self-reliance in the crown vassals. Hallam says it diffused a spirit of liberty,[2] and Guizot describes it thus: "Feudalism did a great service to humanity by exhibiting a continual example of individual will developing itself in all its energy."[3] In England it was said wardship and marriage, the two harshest incidents, were more prevalent than in other countries.

The vice of the feudal tenure appears on the surface of its ordinary working. If I bought or hired a piece of land from a man, why should I be so linked to his destiny and share in all his joys and sorrows so intimately, that when his son was to be knighted or his daughter to be married I must pay him large sums; if he was put in prison, why was I to ransom him? If I died or sold the land, why should my son, or my alienee pay him a large bounty in

[1] GUIZOT says it is a common mistake, which the "Book of Feuds" shares, that at first the vassal's interest was always precarious, and then advanced slowly stage by stage, first to a fixed term, then to interest for life, then for the heirs and assigns. He says all these forms flourished together, and contemporaneously from first to last. —3 *Guizot*, *Fr. Civ.* Lect. 2.

[2] 1 Hallam, Mid. Ag. 268. [3] Guizot, Eur. Civ. Lect. 7.

the form of a relief or fine? and why should my best horse or jewel belong to him? If I committed a crime, why should my land be confiscated by him? If I left an infant heir, why should he insist on being the guardian, and reaping the profits, and finding that heir a wife; and if I left an infant heiress, why should he insist on her marrying one of three persons he chose to name, otherwise to pay him a large sum to be off the bargain? All these consequences were so utterly illogical and incoherent, that nothing but the mailed hand and nomadic life and rough rapacious habits of the camp could so long have perpetuated them.

Abuse and decay of that law.—The ultimate effect of the feudal system was to make it impossible for any subject to concentrate in himself the entire rights relating to his land and enjoy absolute property, for as he always held of some lord, this dependence in reality required the entire ownership to be split up into portions which complicated the title. For though one might have the substantial right or *dominium utile*, yet the incidents attaching to the lordship or superior right detracted from its value, and so interfered with and crippled the absolute ownership as sometimes to create a forfeiture or total annihilation of the vassal's interest, and at all times he felt himself oppressed with vexatious and irrelevant exactions.[1] After centuries of growing abuses arising out of feudal tenures it was at length seen that there was not in reality, and ought not to be, any logical connection between the lord and the vassal sufficient to constitute this compulsory and intimate partnership between them in the land, for by doing so the benefits were all on one partner and the burdens all on the other, and complication and confusion beset both. Each individual ought to be able to enjoy the full and absolute rights of property which the law allows, independent of the acts or incidents of third persons, and it was chiefly owing to this change in the views of society that the most preposterous of the feudal characteristics were totally abolished in the reign of Charles II., and a gradual disposition has ever since grown up to convert copyhold and other tenures, the outstanding relics of feudalism, into freehold tenure, that is to say, into an absolute and undivided

[1] The feudal system declined in England very rapidly from the time of Edward I.—3 *Hallam, Mid. Ag.* 165.

ownership. This species of ownership is the only sound arrangement compatible with a state of society in which slavery is no longer tolerated or acknowledged, and in which business is sought to be facilitated, and free play allowed to the varied operations of commerce.[1]

The civil law, what.—It is necessary to advert to several significations given to the words "civil law." The first meaning is that which puts it in contrast to such phrases as criminal law, military law, ecclesiastical law. The other more limited and special meaning is that which denotes the Roman law, or the municipal law of the Roman Empire. The division of the law into criminal and civil has already been adverted to, and it was shown that, though it was not so substantial a division as to be adopted in any systematic exposition of the whole law, yet it was a popular and convenient mode of separating the treatment of rights according as the violations of law were slight or grave.

Sometimes also the expressions military and naval law are used in contrast to civil law, as separating those peculiar laws which regulate the military and naval professions. This distinction is obviously one of mere convenience, and indicates no fundamental principle. Again, the phrase "ecclesiastical law" is in like manner used in contradistinction to civil law, as indicating those laws which peculiarly relate to the Church and the clergy, the rest of the law being in that view described as civil law. These ecclesiastical laws, as already pointed out, fall under

[1] The feudal law is the delight of antiquaries, and Spelman marvelled that my Lord Coke had not turned into so fruitful a field.—*Spelm. Orig. of Terms*, ch. viii.

MONTESQUIEU admired the feudal system, and compared it to an old and majestic oak. BENTHAM compared it to that fatal tree the manchineel, whose juices are poisons to man, and whose shade is destructive to vegetation.—*Bentham's Princ. of Civ. Code*, ch. vi.

J. S. MILL says the feudal law possessed a certain degree of suitableness to the wants of the society among whom it grew up, but advancing civilisation heaped law upon law over it like strata in the physical world, and "every struggle in the disjointed condition of the part of the field of law which covers the spot, nay, the very traps and pitfalls which one contending party set for another, are still standing, and the teeth, not of hyænas only, but of foxes and all cunning animals, are imprinted on the curious remains found in these antediluvian caves."

the important division of the law, entituled "Security of Public Worship."

The Roman law, called the civil law.—The civil law, or the Roman law, was the most elaborate system of municipal law which had held a conspicuous place in the world, until the middle ages slowly developed the laws of modern nations, which contained many new views and settlements unknown to the ancients, and which now, having been matured, have almost entirely cut off the modern from the ancient polity. Justinian's collection of the Roman law was completed by Tribonian and other lawyers about the year 534, and was current in the eastern portion of the empire. In the western part of the Roman Empire there had previously been an attempt also to consolidate the immense mass of laws then current. Two private lawyers, supposed to have lived in the reign of Constantine, had made collections with that view, called the Gregorian and Hermogenian codes, and the Emperor Theodosius the Younger directed a code of imperial constitutions to be compiled about the year 438, then and thereafter known as the Theodosian code. But when the civil, or Roman, law is referred to, it is the body of law bearing the name of Justinian which occupies the leading place.

The body of law called by the name of Justinian began with the code published in 529, and revised in 534, and the digests or pandects in 534. Of these digests, which were loosely arranged, the extracts from Ulpian constituted about one-third of the work, from Paulus a sixth, and from Papinian a twelfth. The Institutes accompanied the digests as an introduction founded on the commentaries of Gaius and others. Lastly, the novels, or new constitutions were published soon after Justinian's death, which occurred in 565. Justinian's body of law was after 300 years replaced by the Basilica of Leo, which was republished in 945. The Basilica, with some new constitutions of the later emperors, still held favour at Constantinople when the Turks, in 1453, extinguished the Eastern Empire and its law. In the Western Empire Justinian's laws had been little known, but the study became more prominent at Bologna in the twelfth century.[1]

[1] Savigny pointed out the mistake long current, that the discovery of the copy of the Pandects at the siege of Amalfi, in 1135, was the

The Commentaries of Gaius, the earliest institutional writer who flourished in the time of the Antonines, were imperfectly known till a copy was accidentally discovered in 1816 by Niebuhr, and published in 1820, and this has added much to the interest of this branch of legal study.

Its importance and application in England.—The Roman law will always command the attentive study of all who desire to be assisted by the ripe experience of generations of the jurists of a great and powerful empire, which long held sway over great varieties of tribes and nations. Much of the art of governing mankind, and the art of putting difficulties in train for a solution, is common to all countries, and as the phraseology used by that law has long been current, and been absorbed into all modern languages, and moreover as large portions of that law have been bodily appropriated, or at least adopted with very little variations by several modern countries, the utility of such a study is obvious, and is not so visionary as many practical men represent. In England in modern times the chief sources of interest lie in the law of contracts and the law of servitudes, and the courts of this country have gladly borrowed a ready-made solution for difficulties, which no recognised rule of their own clearly provided for, by resorting to the storehouse of precedents accepted and acted upon in those departments of the civil law.[1]

Though the Roman law has no intrinsic authority in

means of first diffusing a knowledge of that part of the Roman law, as other copies were studied before that date.—1 *Hallam, Const. H.* 63; 2 *Guizot, Civ. Fr.* Lect. 11.

At certain epochs the tenets of the civil law fascinated ruder minds, and we are told that at Florence the copy of the civil law was deposited as a sacred relic in a rich casket, bound in purple, and exhibited to travellers by monks and magistrates bareheaded, and with lighted tapers, as if it had been a divine revelation.—*Brenckman*, b. i. ch. x.

[1] SAVIGNY: "Our admiration of the Roman law is almost entirely confined to its theory of contracts. The remainder of this law might have been discovered by plain good sense, without any juridical cultivation, and for so slight a gain it is not worth while to invoke the laws and lawyers of two thousand years to help us."—*Savigny, Voc. of the Age* (tr. by Hayward), 43.

FABER and HOTTOMAN (1610) opposed the study of the Roman law as full of obsolete doctrines, which gave no assistance to modern lawyers in matters of daily occurrence. HOTTOMAN said not one-

England, yet the English law in the time of Bracton and the earliest writers was largely made up of extracts and adaptations from the summaries of that law then current among learned men in all countries.[1] Though Coke and others resolutely maintained, that the English common law was indigenous, this view is opposed to the common knowledge and habits of international intercourse which prevailed in the twelfth, thirteenth, and fourteenth centuries.[2] England partook of the common heritage of the age. Yet in modern times even Bracton's authority is not conclusive evidence of what was the ancient law of England, unless it further appears from subsequent writers or reports, that the courts had acted upon it. Thus in the case as to the right of the public to go along the banks of navigable rivers and use them as towing paths, though Bracton, using the same language as the Roman law, said the right existed, and Holt, C. J., in a *dictum* approved of it, yet the court on second thoughts and fuller consideration found that the rule was nowhere referred to or acted on in subsequent times, and rejected the claim altogether.[3] And for a like reason, in the memorable case in 1821 where the public claimed a right to pass over any private part of the sea-shore to get at the sea for purposes of bathing, and the *dicta* of Bracton and the Roman law were relied on for the public right, the court held that there was no evidence that such a rule had ever been adopted in this country, that it was in conflict with other admitted rules, and the public claim was accordingly rejected.[4] The Roman law was, however, followed in the solution of novel and perplexing questions which have arisen in our courts as to the mutual rights of owners of lands through

twentieth part of the Roman law survives, and of that not one-tenth can now be of any utility.—2 *Hallam, Lit. H.* 172.

THIBAUT.—The Romans cannot be said to have done much towards systematising law.—*Thibaut's Syst. d. Pandek.* part i. ch. i.

GIBBON says "the public reason of the Romans has been silently or studiously transfused into the domestic institutions of Europe. It has exhausted many learned lives, and clothed the walls of spacious libraries."—*Decl. Rom. Emp.* ch. xliv. And Milman says the Roman mind had a genius for law.—2 *Milman, Lat. Christ.* 11.

[1] See Guterbock's Bracton, by B. Coxe.

[2] Tiraboschi, Hist. Lit.

[3] Ball *v* Herbert, 3 T.R. 253.

[4] Blundell *v* Catterall, 5 B. & Ald. 304.

which underground water flows;[1] as to easements:[2] as to alluvium of the sea:[3] and as to bailments.[4] And the principle of the civil law was adopted and acted on, that when the performance of a contract depends on the continued existence of a thing or person, the perishing of such person or thing excuses the contractor from performance.[5]

The canon law.—Another species of law, which is to some extent more closely connected with the law of England than the civil law, is the canon law, or that body of Roman ecclesiastical law which had grown up in the middle ages. This law is a digest of the opinions of Latin fathers, the decrees of general councils and the decretal epistles and bulls of the holy see. It borrowed many of its principles and rules of proceeding from the Roman law. It was collected by Ivo in 1114, and afterwards methodised by an Italian monk named Gratian, about the year 1151, and hence generally called the *Decretum Gratiani.* Collections of later decrees were published under Pope Gregory IX. and Boniface VIII., Clement V. and John XXII. All these form a body of law called the *Corpus Juris Canonici.* Besides these, there were laws of a like kind local to England. Certain legatine constitutions were enacted in national synods, held under the Cardinals Otho and Othobon, legates from the Popes in the reign of Henry III., about the years 1220 and 1268. Certain provincial constitutions were also enacted in provincial synods, held under the Archbishops of Canterbury between the reigns of Henry III. and Henry V., and adopted in the province of York in the reign of Henry VI.[6]

At the time of the Reformation Parliament contemplated that a review of the canon law should be made, and enacted that until such review all canons, constitutions, ordinances, and synodals provincial, then already made and not repugnant to the law of the land or the king's prerogative,

[1] Acton *v* Blundell, 12 M. & W. 324; Chasemore *v* Richards, 7 H. L. C. 387.

[2] Smith *v* Kenrick, 7 C. B. 565; Baird *v* Williamson, 15 C. B, N.S. 376; Humphries *v* Brogden, 12 Q. B. 239; Rowbotham *v* Wilson, 8 H. L. C. 348.

[3] Gifford *v* Yarborough, 5 Bing. 163. [4] Coggs *v* Bernard, 2 L. Raym. 909. [5] Taylor *v* Caldwell, 3 B. & S. 826; Appleby *v* Meyers, L. R. 2 C.P. 661. [6] 1 Bl. Com. 82.

should be still used and executed.[1] This statute has often been supposed to have introduced to England to some extent the canon law as it then existed, and as the contemplated review has never taken place, the authority of such laws as existed before that date has been treated as continuing. There were canons enacted by the clergy under James I. in 1603, which were never confirmed by parliament, though approved by the king, and as to these Holt, C. J., and L. Hardwicke thought that, though binding on the clergy, they are not binding on the laity.[2] The provincial constitutions, however, collected by Lyndewode have always been recognised by the ecclesiastical and also the common law courts as having authority, where they relate to the general usages of the Church.[3]

The usage which has prevailed under the joint operation of the statutes and of the provincial constitutions, founded as these were on the general common law, has long been appealed to as a part of the law of England, in questions that have from time to time been raised with reference to matters of ecclesiastical law. Hence it is not unusual to speak of this as the ecclesiastical common law.[4] And while our courts have often repudiated the authority of the canon law so far as it is a system emanating from the Pope, yet that modification of it which has prevailed in these provincial constitutions has been as expressly recognised.[5] Hale observed, that it was only by an act of the supreme civil power of this country, that any authority could be given to the law prevailing in other parts of the world; and by no other authority could the canon law of Europe come to be part of the law of England.[6]

[1] 25 Hen. VIII. c. 19, revived by 1 Eliz. c. 1.

[2] Crofts *v* Middleton, 2 Atk 650, 2 Str. 1056; R. *v* Bp. Lichfield, 2 W. Bl. 968; Bp. Exeter *v* Marshall, L. R. 3 H. L. 17.

[3] Martin *v* Maconochie, L. R. 2 Adm. & Ecc. 116, 153.

[4] *Per Whitelock*, Evans *v* Owen, Godbolt, 432.

[5] *Per Tindal*, C. J., and *Abinger*, C. B., R. *v* Millis, 10 Cl. & F. 678, 745; Wilson *v* McMath, 3 Phillim. 67, 78; Sandars *v* Head, 3 Curt. 565, 583; Martin *v* Maconochie, L. R. 2 Adm. & Eccl. 195.

[6] HALE, C. J., quoted, Middleton *v* Crofts, 2 Atk. 669; R. *v* Millis, 10 Cl. & F. 578.

"The superiority of the ecclesiastical to the temporal, or at least the absolute independence of the former, may be said to be the key-

All that part of the law of England which has grown out of the canon law, may now be said to belong to that division of the law entituled "the Security of Public Worship." It is true that the subject of wills and marriages had long been appropriated by the ecclesiastics as their own peculiar domain, but their influence has now been wholly eliminated from these branches of the law, and their administration entrusted to the ordinary courts, as will be explained under the division of the law entituled "Judicature."

Distinction of common and statute law.—The general nature of all laws being this, that they are the restrictions imposed on the conduct of individuals in a great variety of situations, it is a natural question thence arising, How the courts of justice arrive at a knowledge of what the law is, out of what sources, in what quarters they inquire for it, and what is the form in which it is found? In such an inquiry the first thought is, that as there is now a legislature existing, and which is presumed to exist for the sole purpose of altering the preceding law, and creating new laws, so we must assume that there has always been a legislature either in its present form or in a more rudimentary form, but still endowed with substantially the same powers, and standing in the same relation to the changing wants of society.

When the legislature in the present day declares a new law, it does so in the form of a statute, and we can trace a series of such statutes extending back for some centuries. Many of these are deemed the old statutes, before the reign of Edward III., and the new, or later, statutes after that date; one of the older statutes is that which is generally known as Magna Charta, a charter which was granted, as Hale observes, "in a parliamentary way." The old statutes have, indeed, been called by Hale part of the common law. But the series of statutes from Edward III., which is an orderly series, down to the present time, discloses a large and fruitful source of the laws, for the theory is, that a statute, however ancient, remains in full operation and effect until it is altered by some other statute of a subsequent date. This doctrine, according to

note which regulates every passage in the canon law."—2 *Hallam, Mid. Ag.* 204.

Hale, applies at least to all the statutes made subsequent to the accession of Edward III., there being previous to that epoch some uncertainty as to what the constituent elements of a statute then were.

But this long series of statutes, voluminous and detailed though it be, does not account for the whole of the laws under which we live, for there are numerous principles, rules, and maxims, which are found in force at a period antecedent to all existing statutes, and the origin of which cannot easily be traced or accounted for; and yet their influence penetrates all the operations of daily life. This large body of law, which is distinct from the statute law, is called the common law, and where the laws of England are spoken of generally, they mean the sum of these two divisions, which are the complement of each other, neither of them being complete without the other.

Written and unwritten law.—This great division of the law into common law and statute law is sometimes used as synonymous with the division into the unwritten and the written law, because statutes have been, as a matter of course, committed to writing, and latterly to print, and published as the declarations of the legislature addressed to the public at large: while, on the other hand, the common law was not to be found recorded in any systematic code or book, but so far as not embodied in the oldest statutes, has been handed down as a tradition from generation to generation in the form of maxims or customs. And yet, though the common law is in its origin nothing but oral tradition, it is searched for with greatest success in certain well-known repositories, which are printed and published, namely, the decisions of courts of justice, and treatises of great antiquity, as well as in general reasoning upon principles recognised in those two collections.

Origin of the common law.—But though the statute law speaks at once to the reason with commanding effect, being the declaration of the sovereign authority of the state, and binding upon all the subjects of the realm, much curious speculation has been spent on the inquiry how the common law came also to be equally binding and of still greater authority at an earlier period—from what source it sprung, and by what combination of circumstances it has

come down from age to age, strengthening with our strength, and becoming more sharply defined in its main features as its antiquity has increased.

In all laws there must, for like reasons, be a fundamental distinction somewhat analogous between the written and unwritten law, for the origin of writings can be traced, and still there must have been an antecedent law which those writings displaced or modified, as well as a mode of interpreting and acting on written laws which is not expressed in the body of those laws themselves. In the Roman law the distinction was of little note, and was somewhat literally applied, for written law was deemed to include only what was originally committed to writing, such as the laws of the *populus* and *plebs*, the *senatus consulta*, and constitutions of the emperors, as well as the edicts of prætors and magistrates, and the responses of jurisconsults; while that part of the law, consisting of rules of practice and of argument, and orally used and referred to, but not recorded, and known as customary law, was called the unwritten law.[1]

Though this distinction has always been drawn between the written and unwritten law, between the statute law and the common law, it is a distinction which indicates little more than the origin, or rather the form in which the law has been promulgated, for it is obvious that whether a law, if properly made, has been immediately put into writing and printed, or has circulated as an oral tradition, can make no real difference as regards its binding effect. It may be more difficult to ascertain and interpret an oral law than one that is put into articulate language; for, the more vague and general a law is, the more difficult it is to be applied and acted upon, and vagueness is more likely to attach to a law which circulates in the memory of the people than to one which is recorded in written language, and which the rules of interpretation can fix with reasonable certainty.

Statute law is supplementary to common law.—But though the mere distinction between common law and statute law is based on the original medium in which each law is found, rather than on the subject-matter of the law itself,

[1] Dig. i. 1, 6.

there is also a large and important difference in their scope and mutual relations. The statute law is in strictness merely supplementary to the common law. The common law, however it may have originated, is assumed to have formed the sum total of the laws governing the community before statutes were made and published. Being the sum total of the law, it is further assumed, and this assumption is the most remarkable of its characteristics, to have provided for nearly all the ordinary evils which laws could cure, and to have supplied the remedy for nearly every wrong, at least such as were prominent at that remote age It has been and still is the province of the legislature to discover and amend the common law in those points where it is vague and inadequate, or fails to meet the exigencies of the time. The whole series of statutes embody these results of legislative vigilance. Hence, in order to understand thoroughly what a statute means, it is often necessary, and always useful, if not indispensable, to know what was the state of the common and statute law on the subject antecedently to the statute in question. When that preliminary knowledge is acquired, the task of interpretation is greatly facilitated, for, as will be seen hereafter, one of the canons of interpretation is, first to ascertain, what was the evil or mischief in view of the legislature when the statute was passed.

There is in civilisation no rule more clearly established than this, that the exposition of the law shall be left to the courts, and the declaration of new law be left to the legislature; and as a corollary to this the maxim is inexorable, that when once the legislature has spoken, those words cannot be unspoken by any power except the legislature itself. Once a statute, always a statute. Nothing short of a new statute is required to repeal a prior statute, and no length of non-user will ever render the words of a statute less obligatory and less decisive than they were the first day the statute was published. This, however, was by no means the ancient idea of legislative action. The notion that a statute became void, when the king who was the chief actor in passing it died, or when it had been long neglected, was current in England in early times, as it was current then and much later in other countries. The ancient doctrine was, that statutes could go into

desuetude by neglect.[1] Hence the practice so common in the reigns succeeding that of John, of republishing Magna Charta at the commencement of each new reign, and even at the commencement of a new parliament.[2] And Richard II. had an ordinance that all previous statutes be kept, which shows how loose were the notions at first entertained as to the indelibility of statutory law.

Theories as to origin of common law.—Several theories have been current as to the mode in which the common law originated, though Lord Hale said its original was as undiscoverable as the head of the Nile,[1] and Fortescue and Coke, as we have seen, are extravagant in antedating its rise. Not a few resort to the ingenious fiction, that the common law is merely a collection of ancient statutes which have been worn out[3] by time, but of which the purport and bearing have lingered in the memory, and have been handed down as traditions from age to age.[4] This theory indeed eludes all the lessons of history, and as an explanation it in reality amounts only to this, that some of the statutes are a little older than we suppose, while the point to be elucidated is the state of things antecedent to statute, for statutes after all indicate an advanced stage of society. Another theory is, that the common law is merely a collection of the general customs found universally current, and acted on by the people. Special or local customs are familiar in many branches of the law at the present day, as will be seen in subsequent chapters; but their operation is not universal. Local customs are confined to a limited area, and to limited classes of people, and often to special times or occasions; and as such they are deviations from or exceptions to the general law, and binding on a limited part of the community only, or at least on

[1] Barrington, Stat. 186.

The Romans had a principle, that by long disuse a law became void and of no effect.—*Cic. in Verr.* v. 18; *Inst.* 1, 2, 11; *Dig.* 1, 3, 32. In Scotland this doctrine is applied to all the Scotch statutes passed before the Union in 1707.

[2] 5 Ed. 2, Ord. c. 27 (Stat. Realm.)

[3] Hale, Hist. C. L. 65.

[4] HALE favours the explanation, that rules, now treated as common law, were acts of parliament, though not now found of record.—*Hale's Hist. C. L.* 66. WILMOT, C. J., said: "The common law is nothing else but statutes worn out by time."—Collins *v* Blantern, 2 Wils. 348. See 2 Hall. Mid. Ages, 339.

such part of the community only as come within a limited area.

By a further generalisation it is assumed that there were also customs which were so adapted to the wants of society as to become of universal acceptation, and binding on all the public without any exception. These general customs were said to constitute what is otherwise called the common law. Such an explanation, however, seems not to advance our knowledge in the least, for what we want to know is how those rules, whether called customs or common law, or by any other name, became such, and at what epoch or by what transitions, and under what influence.

The account given of the origin of the common law has seldom been satisfactory,[1] and yet there must be the same difficulty felt as to the origin of the laws of all civilised communities. The obscurity of the origin seems sometimes to be even a matter of pride, for another branch of the theory relating to the common law is, that not only was it in existence before all statutes now known, but no time can be named when it was not in full vigour, and when it did not regulate all human affairs; and though the precise tenets of the common law are now chiefly searched for in the old decisions of courts or ancient treatises, our authors all assume that those decisions did not create, but that they merely expound, the common law as rules which antecedently existed, and are a kind of secondary evidence of what the law was, but do not constitute the law itself.

The convenience of this theory lies in this, that if two or more ancient decisions or treatises do not agree, this variance is set down merely to the imperfect exposition or apprehension of the courts, but does not conclusively show any imperfection or great defect in the original law. For the common law is assumed to have been a perfect code, or nearly so, furnishing a remedy for nearly every wrong; and if that remedy cannot now be sufficiently traced and appreciated, it is said to be the fault of the medium through

[1] BENTHAM indignantly observes: "The common law was made by nobody: not made by king, lords and commons, nor by any one else: the words of it are not to be found anywhere: in short, it has no existence: it is a mere fiction: and to speak of it having any existence is to give currency to an imposture."—4 *Benth. Works*, 504.

which the knowledge was conveyed to us. It is at all events assumed to be a code nearly exhaustive of every remedy which law can supply, and free from defects of at least any importance, according to the notions and habits of the age in which it flourished.[1] And Blackstone, carried away by this view, remarks, "It is one of the characteristic marks of English liberty that our common law depends upon custom: which carries this internal evidence of freedom along with it, that it was probably introduced by the voluntary consent of the people."[2] That passage, it has been justly remarked, involves this error, that it implies that customary law was the source of English liberty, whereas the customary or common law involved and recognised the serfdom of the lower classes during the middle ages and down to the age of Elizabeth, and there was little of real liberty in that arrangement of classes.[3] The real origin of the common law, as an acute writer has remarked, has been too much extolled, and we must look to no higher or more authoritative origin than the decisions of such judges and courts as expounded the law, or what corresponded to law, at a time antecedent to all known statutes.[4] Nor can it be said with truth, that, because general custom may be assumed to have been accepted with the consent of the people governed by it, it is on that account more favourable to liberty. For the liberty of most nations has been effected by the legislature altering the custom, and often in the proportion to which

[1] While the unwritten law in this country is found in the decisions of the judges, who are, as BLACKSTONE says, the living oracles, its discovery seems in other countries to have been left to more precarious resources. We are told that in parts of the Continent the unwritten law was in disputed cases proved by witnesses, till the customs were consolidated into written statements or statutes.—*Canciani*, *Leg. Barb.* b. 5, p. 13; *Giannone*, *Hist. Naples*, b. 21; *Dupin*, *Hist. of Fr. Law*.

The Roman law is said to have also recognised inveterate custom as equivalent to law, or as a mode of originating law equal to a statute.—*Dig.* 1, 3, 32. And the great jurists who devoted themselves to the study of the law also added more or less to the code of rules, by publishing their opinions, which became insensibly adopted from time to time by all the public as well as by the legislature. The *responsa prudentium*, unlike the opinions of eminent counsel in this country, were used by the Roman courts as part of their materials.

[2] 1 Bl. Com. 74. [3] 2 Aust. Jur. 559. [4] 2 Aust. Jur. 560.

that legislation has receded from and overturned such custom, has the glory of modern law been most conspicuous.

How customs grow into common law.—Supposed superiority of common law over statute law.—To ask how it is that customs come to be universal, and thus tacitly grow into the general law, is not less idle than to ask why human tendencies and faculties were made as they are, and why, in spite of ourselves, we sooner or later agree with our neighbours, or they with us, not only in our habits and modes of action, but, as far as can be ascertained, even in many of our secret thoughts. This unity of thought and sentiment is the law of our being, and while circumstances of race, of climate, of soil, of neighbourhood, of battles, victories, and defeats give a predominance to some one virtue or defect, the result nevertheless is, that the substratum of rights enjoyed, or at least aspired to, by the subjects of all countries is much the same, and national peculiarities, or rather national defects and incapacities, play a comparatively small part in every municipal code. But whatever may be the laws which have been derived from custom, these are always necessarily vague and uncertain, and for no other reason than because the less a community has advanced towards civilisation, the more is its legislation incapable of those nice distinctions of thought and language which civilisation sooner or later brings in its train. Justice and right are at first expressed in general phrases, and often are enunciated in poetry or sounding verse.[1] And though, when administered by vigorous and impartial judges, language of wide import helps rather than impedes sound decisions, yet civilisation can never rest till it searches out more detailed, accurate, and appropriate provisions and appliances of justice, than any common law can ever dream of. Distinctions are

[1] The laws of Pittacus were said to be in verse. And the laws of Charondas were also uttered in verse.—*Gibb. Decl. and F.* ch. xliv. In ancient Erin, if the legislature did not in early times speak in verse, it was, at all events, the practice to give to the poets the office of expounding the law, until, on a memorable occasion, a declamatory exposition of one *ratio decidendi* led to the poets being discarded, and the profession thrown open. And this change produced excellent results.—2 *O'Curry's Lect.* 2; 3 *Anc. Laws Irel.* ch. lii.

drawn, exceptions are discovered and allowed, procedure is amended, punishments graduated, jurisdiction defined, as society advances.

Supposed superiority of common law over statute law.—Judges, however, following Coke, are to be found, who, forgetful of these things, utter vain regrets that the brevity and the breadth of the common law have been overlaid and encroached upon by materials that have spoiled its symmetry. They forget that the common law, being conceived in an age of comparative barbarism, is devoid of that flexibility and adaptation, which the wisdom of judges themselves alone has given to it. It is this latitude and amplitude of discretion invariably vested by the common law in its administrators, which make the latter insensibly cling to it so closely. But the unerring instinct of civilisation demands above all things that law shall be certain, discriminating, and easily understood by those who are to be guided by it, and certainty cannot in general be attained without particularity and copiousness of expression, and these again in turn not seldom degenerate into diffuseness and tautology. Thus, while judges are too frequently apt to view the common law as inherently superior in quality, as it undoubtedly permits and demands wider excursions in reasoning, those who have to obey both are more inclined to prefer the statutory law for no other reason than because they know it to be more minute and painstaking, more sedulously framed so as to distinguish between classes of circumstances, more easily known and discoverable, more zealous to facilitate procedure, to bring justice home to each and all, and so attain a higher standard of right—a system of rights better adapted to the varying conditions of the governed. There is no real repugnance, because there is no common ground of comparison, between the common law and the statute law. The former is the normal municipal law; the latter grows out of it, and is always intended to rectify, and improve, and expand the former. They are mutually the complement of each other. Nations cannot help beginning with the former, and cannot help ending with the latter.

The common law is indeed to this day the storehouse of many of the leading principles on which our rights depend, for though the statutes embody masses of specific

laws, these were chiefly designed to meet special cases of hardship. And probably on this account a habit has grown up of viewing the statutes as treating only of things evanescent and changeable, in contradistinction to those more solid and enduring elements elsewhere found, and which are superior to change. This is, however, an error that requires constantly to be corrected. The common law could only supply rules and maxims of right, applicable so far as the circumstances of the age had developed rights and wrongs, or rather the occasions which gave rise to the necessity of laws. But as society is progressive, as new wants arise with each generation, and new customs inevitably supervene to displace the old, it is obvious that the common law requires to be always recruiting from the statutes, in order to keep abreast of the times, and so as to satisfy the rising standard of justice as it grows and expands from age to age. Without this elastic principle the best common law must soon develop the seeds of its own decay.[1]

Voluminousness of statutes.—Not a little of the distaste, if not contempt, which lawyers too often evince for the statute law as contrasted with the common law, is the extraordinary diffuseness and voluminousness of the former. Not only are the general statutes composed of details too vast for any human memory, and composed in a barbarous and debased technical language, but over and above the general statutes there are local statutes and groups of statutes regulating every several town, corporation, and district, every body of commissioners, every railway, harbour, and local improvement board in the kingdom. The details of each of these groups of statutes

[1] LORD MANSFIELD rhetorically observed that "A statute very seldom can take in all cases; therefore the common law, that works itself pure by rules drawn from the fountains of justice, is superior to an act of parliament."—1 *Atk.* 32.

It is well to hear what an acute intellect, but not that of a lawyer, has to say on this point. "Blackstone speaks with uncommon respect of the old common law, which the generality of lawyers highly prefer to the statute law. He will find it, however, difficult to persuade an impartial reader, that old customs (begun in barbarous ages and since continued from a blind reverence to antiquity) deserve more respect than the positive decrees of the legislative power."—5 *Gibbon, Misc. Works,* 546.

must be kept in view by those who live in the particular locality affected, if they wish to know all the law that governs their interests, and which comes home to them. The strain on the memory of man is thus prodigious, when all this law that is common to the whole empire, and all that is applicable to each separate locality, are taken together as the rule of conduct and the test of right and wrong.[1]

Judiciary, or judge-made law, what.—A statute, inasmuch as it is the most direct and immediate act of legislation, and the voice of the legislature itself, is, however, to be distinguished from certain other indirect and circuitous modes of originating rules of law. Thus the courts, as the proper and only authentic expositors of what the law is, find it impossible to carry on the work of interpretation, exposition, and application of the law to individual cases, without establishing certain subordinate rules of procedure as well as principle, and these in turn operate as a species of derivative legislation. In truth, however, these rules of practice and procedure are to be viewed as nothing more than the tools or weapons, with which the courts exercise their proper functions. No man in the business of daily life can carry on the commonest handicraft without generalising the work which he undertakes, and setting about what he does according to certain rules and methods which practice has proved to be the simplest, and shortest, and easiest for its furtherance, and which after a little experience become a second nature, and influence him unconsciously. The carpenter uses his saw or his hammer, the woodman his axe, the ploughman his team, and the compositor his type according to well-established methods, and these have become a secondary law of themselves. Every trade and occupation of life has its appropriate method of work, and a certain routine in all its multifarious appliances, which may, in a popular sense, be called the law of that trade. In like manner courts and judges set about the business of expounding and applying the law according

[1] DUNNING said that he professed to know the chief rules of the common law, and to carry them in his memory; but as to the statute law, the utmost he could do for his clients or anybody else was to give an opinion as to the construction of a particular enactment when it was placed before him.

to well-known methods, which when stated in detail seem to be the mere creation of some unrecognised legislative function, whereas the whole is referable to the necessary action of reflective beings, who insensibly generalise as they proceed, and settle into some approved routine, whatever be the work that is undertaken.

Necessity of judge-made law.—The great body of what has been called judge-made, or judiciary law, is wholly attributable to this tendency of all human employments, and so far from such law being stigmatised as having been invented without authority and entitled to little respect, it is impossible in any system of jurisprudence to dispense with it. It is on the same footing as all other expositions and adaptations of law. The bye-laws made by corporations, collegiate, and statutory bodies invested with administrative powers are all examples of the same tendency. No code could descend into all the minute particulars to which it is found necessary to enforce attention in conducting local affairs and carrying out special purposes; hence the same result is secured by investing some body or authority with necessary powers to carry out the general purpose, and to define through the medium of bye-laws the methods by which it is to be secured. The tendency of all persons charged with general duties to use subordinate rules and methods in carrying out their work is an inevitable accompaniment of such work. When a general sends his officer to execute a certain operation in the field, it is impossible to give even in outline all the details of the process or the successive steps by which the result is to be arrived at. Much of the detail must be invented by the subordinate charged with the execution of the work as each step of the work advances. In the same way, judges and courts, who have the duty of applying a general rule or statute, must inevitably invent many of the details of the machinery, and so give rise to what has been called judiciary law, but which is of equal authority with any other description of law.[1]

The mystery surrounding the growth of what is called the common law, and all that law which cannot be traced

[1] In Rome the province of legislation was silently invaded by the expounders of ancient statutes, such as the Twelve Tables.—*Gibbon, Rom. Emp.* ch. xliv.

directly to any statute or express declaration of the legislature, seems to be removed to some extent by the reflection, that in the early stages of all organised societies the judicial or expositive and the legislative functions are conjoined;[1] and it is only in the course of widening experience of its inconveniences, that the two functions become separated, just as in highly civilised communities all labour becomes subdivided, and this in turn leads to improved results. Even after the Norman Conquest the Aula Regis, or great court-baron of the kingdom, was a court of justice as well as the sovereign or supreme legislature,[2] and the House of Lords has held this double function, derived from ancient practice, though latterly there has been considerable modification, and the legislative function has been entirely separated from the judicial in all except in name.

Objections to judge-made law answered.—Notwithstanding the very obvious reason why judiciary law is inevitable, some authors have with little reflection denounced it as if it were a fraud on the legislature and on the public—as a counterfeit of a statute without the authority or weight which a statute commands.[3] Thus Bentham says judiciary law is not properly law, but is at most a *quasi* command or something analogous to a command. The answer to

[1] In rude ages the legislative and judicial functions have generally, if not always, been vested in the same hands. The patriarch was lawgiver and judge in his own family and clan. Among the American Indians the chiefs in council are judges, legislators, and executioners.—1 *Schoolcr. Ind.* 261, 274. The early Roman kings and the monarchs of the East sat on their thrones and administered justice to all comers.—*Livy*, b. i. c. xl.; *Diod.* i. 74. The populus of Rome, which was the supreme legislative body, was also the judge in capital cases. The Micklemote or Wittenagemote of the Anglo-Saxons was both the legislature and a court of justice. Among the Kaffir tribes at this day the chief and his council combine the legislative, judicial, and executive function.—*Maclean's Kaffirs*, 32. And the feudal chiefs were judges and executioners within their respective territories.

[2] The judicial business of the Curia Regis was supposed not to be separated from its legislative, till the reign of Henry. II.—1 *Spence Eq. Jur.* 107.

[3] AUSTIN also attacks judge-made law as an illegitimate statute, as vague, hasty, incoherent, *ex post facto*, nowhere authentically recorded, and as tending to render the co-existent statute law bulky and unsystematic.—2 *Aust. Jur.* 671.

this is, that while a legislature, or, what is the same thing, while the common law, speaks in general language, and frames its rules in wide and sweeping phraseology, there must be some exponent, who is to decide, whether and how far particular circumstances and occasions are to be governed by, and come within the scope of, those general rules. If in the course of this decision the exponent or judge frames to himself subordinate and secondary rules, this is to be regarded merely as the machinery by which the statute or common law can alone be applied to the affairs of ordinary life, and is therefore as much entitled to recognition, as if the legislature itself spoke by the mouth of the judge in each particular adjudication. Again, it is objected to judiciary law, that it is arbitrary and uncertain. This, however, resolves itself practically into a question as to the capacity of the judge, for nothing can be more clearly verified by experience than this, that though judges of equal ability and experience often arrive at different conclusions when reasoning from the same premisses, yet the opinion of the majority is usually that which best stands the test of subsequent inquiry, being the soundest view attainable in the circumstances. And certainly there is nothing which can be called arbitrary in that which is the average opinion, for it is in other words only a synonym for the opinion at which the greatest number of wise and capable men educated for the business, and who apply their minds to the same subject, would also arrive. Solon, it is true, is said to have made his laws purposely vague and obscure, that the judges might have a larger discretion;[1] and Lycurgus refused to commit his to writing for a like reason.[2]

Another objection to judiciary law is sometimes advanced, which is this, that judges thereby assume the position of legislators, and yet the community have no check or control over them while making such law. But this is answered by the remark, that the legislature must be taken to have so *intended* judges to act, for if it wishes to render judiciary law impossible, it has only to issue its laws in a more detailed shape, so that in the vast complexity of human affairs there may always be at hand a rule sufficiently precise and definite to meet each particular case.

[1] Plut. Solon. [2] Plut. Lycurgus.

Until the legislature can afford to do this, and it cannot be done without making statutes too voluminous, judiciary law is inevitable. And though judges are usually appointed by the crown, and not by the people, this circumstance does not affect the nature of the duty which must devolve on all who are appointed to apply general rules to particular circumstances. Whoever appoints the judge, if the latter is able to discharge the duty, there is only one mode by which he can do so, and that is by reasoning, as all capable men must reason, when starting from the same general principles, and inquiring which of several principles is that which solves the particular difficulty.[1] The first step of a judge is to strip each case presented for adjudication of all its extraneous and immaterial circumstances. This preliminary step requires great skill and reflection, and when all that is accidental and fortuitous in surrounding circumstances has been eliminated, the result is the abstract rule or principle, or *ratio decidendi*. If judges did not in the process of stripping each case of these accessories express in articulate propositions, and record for future use the method by which they proceed, but simply enunciated the naked conclusion of their researches, it would only lead to successive judges traversing the same ground over and over, none deriving aid from the labours of his predecessor, but each sailing without chart or compass. Whereas when each explains in a recorded decision the steps of his reasoning, he lightens the labours of the future by erecting finger-posts for travellers, and so assists the public, who are interested in the result, in feeling their way through future complications in the business of life. Judiciary law is merely the register of the steps and finger-posts used in this process of applying general principles to particular cases, and so far from being injurious, or unwarranted, or unnecessary, is the only safe and indispensable means of arriving at the end desired in all adjudications, namely, the discovering of the rule which governs each decision. Statutes and common law principles and maxims must necessarily be general and sweeping in their language, and owing to the infirmity of language be

[1] See one of the finest examples of judge-made law, in the matter how far a master is liable for injury to a servant caused by negligence of a fellow-servant.—*Post*, ch. ii.

more or less obscure, because no legislature can foresee the innumerable variety of complications in human affairs. It may safely be said, therefore, that judiciary law is a necessary incident of all statutory law and all common law, being nothing else than the development and adaptation of the rules to the business of life. It furnishes the connecting medium between the abstract and the concrete—between first principles and ultimate results. All citizens are agreed in the general principles; it is in their application to the facts that they constantly differ, and the whole art and mystery of judicial power consist in supplying the means of solving those differences.

Mode of judicial reasoning.—Much needless refinement has often been attempted in tracing the mode by which judges and courts reason, and by which in the course of their reasoning they develop what seem to be new rules and new laws which are not directly traceable to the legislature. Some authors, as Hale, explain this, by saying that law is formed by illations on anterior law.[1] Others say it is made by consequence or analogy, or that it is built on technical grounds, or that it is made by electing one of two or more competing analogies.[2] In truth judges reason very much as other inquirers into truth and general principles reason. The two great ultimate principles underlying all the reasoning of courts and judges are these. First, that there is, and must be, if it can only be discovered, a solution to be found for every case that arises, and that solution must be found either in some express rule or by induction from the statutes and decided cases and maxims, which are the only legitimate exponents of all the rules that exist.[3] When the last-mentioned materials exist in a loose and vague form, the process of

[1] Hale, Hist. C. L. ch. iv.

[2] Paley, Mor. Phil.; 2 Aust. Prov. Jur. 660.

[3] Thus LORD WYNFORD said: "The judgments of the courts of Westminster Hall are the only authority that we have for by far the greatest part of the law of England."—Fletcher *v* L. Sondes., 3 Bing. 588.

LORD REDESDALE said a new principle must be established to meet fraud, as human ingenuity will always outstrip any cases which have before occurred.—Webb *v* Rorke, 2 Sch. & L. 666.

SIR J. NICHOL said the *jus non scriptum* may be proved, not only by reports of adjudged cases, but by public notoriety, or may be

reasoning or the mode of arriving at the rule which is to supply the solution of the case in hand is all the more difficult. But a judge arrives at his conclusions by precisely the same process of reasoning as the inquirers into scientific laws employ. The latter take certain phenomena as the basis of their induction, just as judges take certain cases, statutes, and maxims in order to discover the higher and more general law which is to reconcile and account for these apparently discordant results or phenomena. The chief difference between judges and scientific explorers is this, that while the laws of nature which science seeks to discover are fixed and immutable, those which the judge explores are only such as exist or are fixed at the time of his inquiry, it being always understood, that if these are found to be not in harmony with the wants of society, there is a legislature at hand to alter them, and make them more conformable to higher views of human affairs.[1] But so far as the judge is concerned, he has nothing to do with what the law ought to be; he confines himself only to what the law is at the time of his adjudication. And hence judges and philosophers are both engaged in searching for laws which they know and believe must exist in point of fact, however difficult to discover; and the mode of reasoning by which they reach their respective conclusions, whether called the balancing of competing analogies, or the interpretation of written language, or the development of first principles, is precisely the same. No court could ever be heard to say that there was no law on the subject of the case submitted for adjudication, just as a scientific explorer would never dream of saying that there was no law which could account for a particular phenomenon. The judge can never be baffled in his search, and is bound to find a law some-

deducible from principles and analogy, or be shown by legislative recognitions.—Wilson *v* Macmath, 3 B. & Ald. 245, n.

[1] Our law does not allow a judge to supply a *casus omissus* in an act of parliament, nor to extend the operation of the statute beyond its plain meaning. But in France, at least in civil cases, a judge who refuses to decide a case under pretext of the silence, the obscurity, or the insufficiency of the law, may be prosecuted for the denial of justice.—*Cod. Civ. tit. prel.* art. iv. And SAVIGNY thinks this must be a rule inseparable from judicial functions.—1 *Savigny, Droit Rom.* 203 (ed. 1840).

where; whereas the man of science may admit that all his explorations have as yet led to no discovery.[1]

Legal fictions.—Here also may be noticed a peculiarity of the law which has often excited the ridicule of bystanders, namely, the practice of using fictions in the practical administration of its rules. The precise function and necessity of legal fictions are by no means clearly marked, and yet they have occupied a prominent place in its history, and have supplied constant materials for the satirists. Bentham has said that a fiction in law is a wilful falsehood, having for its object the stealing legislative power by and for hands which could not or durst not openly claim it, and but for the delusion thus produced could not exercise it.[2] He also described it as a wilful falsehood uttered by a court for the purpose of giving to injustice the colour of justice.[3] Coke, on the other hand, said, fictions in law will never do wrong; they are never made but for necessity, and in avoidance of a mischief, and they are never strained to the prejudice of a third person who is not a party or privy.[4] The fiction by which a common recovery enabled a tenant in tail to cut off an entail and convert an estate tail into a fee simple, enabled the courts to repeal the statute *de donis.*[5] Ultimately the great principle worked out by the judges under Edward IV. was embodied in a statute of William IV.[6] The fiction in actions of ejectment which introduced the names of John Doe and Richard Roe as a machinery for calling into court the real parties interested in a disputed possession and ownership of land, was invented in the reign of Edward III.; and gradually was moulded till it assumed the more rational and direct form of process confirmed by a recent statute.[7]

The fictions by which jurisdiction of courts was extended cannot be justified except by the remark, that in semi-

[1] Our courts have never dared to emulate the feat of the Court of Areopagus, which, when puzzled to find a law applicable to a case, got out of the difficulty by postponing the further hearing, and directing the parties to come up to the court for judgment that day one hundred years hence.—*Aul. Gell.* b. xii. ch. vii.

[2] 1 Benth. Works, 243.

[3] 5 Benth. Works, 13.

[4] 2 Rep. 29b, 30a.

[5] Burton, Comp. 231.

[6] 3 & 4, Will. IV. c. 74 § 2.

[7] 15 & 16 Vic. c. 76, Sched. A.

barbarous times all modes of extending relief are honourable. But as no one now defends fictions as distinct from axioms and postulates in argument, it is unnecessary to dispute the supremacy of Bentham in this field of criticism.

Adherence of courts to precedents.—Not only have judge-made law and legal fictions been used as handles for reproach to lawyers, but their blind adherence to precedents has also kindled the ridicule and scorn of their detractors.[1] In order to appreciate the displeasure provoked by a habit stigmatised as so bigoted and superstitious, it is necessary to consider what is a precedent in the eye of the law.

A precedent has two meanings, which are however closely connected. First it means the deliberate adjudication on some prior occasion of a matter properly within the jurisdiction of the court, and announced with or without reasons, good or bad, given at the time. Secondly it means a form of practice which, with or without reason, has been in use for a great length of time, and which the court and its officers treat as part of the law not to be departed from or altered without the intervention of the legislature. As regards the authority of adjudged cases, it is sometimes asked with wonder and curiosity, why, if a court in adjudicating on a dispute discover that on some prior occasion —it might be hundreds of years before—another court had decided a similar point, or what is considered by it to be substantially the same point, will at once suspend all further reflection on the subject, will refuse to think about justice, equity, or good sense, and will blindly adopt the same conclusion as its predecessor. And this though one of the litigants may have shown unanswerable grounds for believing that such former decision was wrong, *i.e.* that the reasons avowed or conjectured as its basis were ill founded. Though the judges who formerly decided the same point may have been weak, or hasty, or capricious—though their judgment may have been warped by sinister influences,

1 BENTHAM said precedents were avowed substitutes for reason, and the results of the predominance of the sinister interests of the ruling few.—10 *Benth. Works*, 511.

HOBBES ridicules lawyers' slavery to precedents.—3 *Hobbes's Works*, 91.

SWIFT does the same in "Gulliver's Travels."

the growth of a timid or time-serving age—their reasons may have been puerile—may be plainly opposed to the policy, the tendencies, the improved standard of morality, justice, or good sense of the present day—yet in spite of all such criticism the court will stand by the precedent and refuse to think twice on the subject. All this it is suggested is so unlike the conduct of other inquirers after truth (for justice here is truth), that strangers profess to be at a loss to reconcile it with the dignity and single-mindedness becoming the votariés of an illustrious science.

Imputations like these cannot be answered effectually without pointing out one or two leading principles on which the action and procedure of all courts of justice are necessarily based. The province of a court, it must be recollected, is not to legislate but to adjudicate—not to make laws square with one's better judgment, but only to find out and declare what are the laws, good or bad, which exist at the time of the dispute. And as Lord Camden pointed out, a judge is sworn to determine, not according to his own private judgment, but according to the known laws of the land.[1] Whatever complexion a legal adjudication may bear to third parties, it is, within the interior of the court, only a search for a historical fact.[2] What judges try to seek out

[1] 19 St. Tr. 1071.

[2] "An adherence to fixed rules and a jealousy of judicial discretion have in no country, I believe, been carried to such length as in England. Hence precedents of adjudged cases, becoming authorities for the future, have been constantly noted, and form, indeed, almost the sole ground of argument in questions of mere law."—2 *Hallam, Mid. Ages*, 341.

ADAM SMITH says: "In doubtful cases courts, from their anxiety to avoid blame, naturally endeavour to shelter themselves under the example or precedent of former judges. This attention to practice and precedent necessarily formed the Roman law into that regular and orderly system in which it has been delivered down to us; and the like attention has had the like effects upon the laws of every other country where such attention has taken place."—*Smith's Wealth of Nations*, b. v. ch. i.

"Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law or give law. Else will it be like the authority claimed by the Church of Rome, which, under pretext of exposition of Scripture, doth not stick to add and alter: and to pronounce that which they do not find, and, by show of antiquity, to introduce novelty."—*Bac. Ess.* 56.

"Can the twelve judges extrajudicially make a thing law to bind the

is the existing rule, and this is sought by examining adjudged cases published, or at least recorded,—by collating the opinions of ancient or approved text-writers and commentators, if no better secondary evidence can be found—by reasoning from admitted rules applicable to general cases, and pursuing these into the special circumstances, according to ordinary methods common to all human inquirers. Another principle is, that the court considers itself bound to find a law somewhere for each case that arises, and assumes with confidence that the legislature or common law has provided some rule, if only it can be found—not indeed that the rule may be perfect, but good enough to be acted on till a better be found. This assumption may seem to ascribe an attribute of omniscience to some legislature which it may be far from deserving; but it means little more than this, that it does not lie in the mouth of any judge to say he is wiser than the legislature. It means only that if he will take the trouble to inquire he can always satisfy himself either that there is or is not a specific provision applicable, for in either of these events a decision for the purpose of the day can be found, which will dispose of the dispute more or less satisfactorily. But if a judge must act so as not to be wiser than the legislature, the same temper will lead him to give credit to his predecessors, that they, having the same and perhaps better materials, had faithfully acquainted themselves with the appropriate rule of law existing in their time. If any one judge were to set himself up above another, especially above one in whose favour the natural prejudices of men associate veneration with age, he would be in effect assuming the function of legislation rather than of adjudication, he would be unsettling instead of strengthening—and he must look to be himself displaced and unsettled in his turn by his

kingdom by a declaration that such is their opinion? I say no. It is a matter of impeachment for any judge to affirm it. There must be an antecedent principle or authority, from whence this opinion may be fairly collected; otherwise the opinion is null, and nothing but ignorance can excuse the judge that subscribed it."—*Per Pratt*, C. J., Entick *v* Carrington, 19 St. Tr. 1071.

[1] JULIAN, in the Pandects, says that a reason cannot be given for all that our ancestors have established. And CAIUS says he wonders, why some laws should exist.—*Lib.* ix., *ff. De Offic.*

The mischief of disregarding precedents is thus obvious. The moment a court of competent jurisdiction declares the law, and its decision is not made matter of appeal, it becomes known and acted upon and absorbed into the stream of business. Men's rights are adjusted accordingly;—people live and die in the faith that their property and rights are fixed as far as human affairs will permit. But if the deliberate judgment of to-day is to be upset to-morrow, because one judge thinks himself more learned, wise, and clear-sighted than his predecessor, no man could sleep in

ARISTOTLE said no one should be wiser than the laws.—*Arist. Rhet.* i. 15, 12. "It is of less importance that the law should be abstractly right than that it should be constant and invariable."—Lozon *v* Pryce, 4 My. & Cr., 617. It was a favourite maxim of Lord Macclesfield that it was of little consequence how a point is determined at first, provided it is afterwards adhered to.—1 *P. Wms.*, 452, 549; 2 *P. Wms.* 2, 213.

LORD COWPER, before him, had also said the same thing.—Brown *v* Barkham, 1 Str. 30. And LORD KING followed them (2 *P. Wms.* 613), and even tried to pass an act of Parliament to settle some moot point of old standing.—1 *Str.* 569.

LORD MANSFIELD said "the laws of England would be a strange science indeed, if it were decided on precedents only. Precedents serve to illustrate principles and give them a fixed certainty. But the law of England, which is exclusive of positive law enacted by statute, depends upon principles; and these principles run through all the cases, according as the particular circumstances of each case have been found to fall within one or other of them."—Jones *v* Randall, Cowp. 39. In R. *v* Wilkes, 19 St. Tr. 1116, the same judge said that an authority, though begun without law, reason, or common sense, must be followed. And PARKE, J., spoke of finding out the law for every case in this manner. "We have no right to consider a new case, because it is new, as one for which the law has not provided at all, and because it has not yet been decided to decide it for ourselves, according to our own judgment of what is just and expedient. Our common law system consists in applying to new combinations of circumstances those rules of law, which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases that arise: and we are not at liberty to reject them, and to abandon all analogy to them in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of the law as a science."—Mirehouse *v* Rennell, 8 Bing. 515; 1 Cl. & F. 546.

security. The public might awake and find themselves martyrs to the pretensions of one, whose superiority of wisdom they could not be expected to admit, and might successfully dispute.

Where precedents are not deemed binding.—Hence it is, that as between courts of co-ordinate authority and jurisdiction the decision of one will be acted upon by another without criticising the reasons. The proper mode of correcting these is by appeal to a higher court, and if that is neglected, or if the court of appeal confirm the decision, the matter is taken to be settled, and as nearly fixed and irrevocable as anything human can be. The reluctance to go behind such a settlement and reopen the controversy grows with time, and assumes too often that mechanical copying of what has been once held for right, which at first sight is so incomprehensible to strangers. And yet though it must be admitted, that the reproach so often cast upon the legal profession of blind adherence to precedent rests upon no sound foundation, and proceeds from mere want of thought, there were always a few exceptions and qualifications even to that general rule which tended to obviate some of its grosser inconveniences. Until the Judicature Act put all the superior courts on one level, if as between two courts of co-ordinate jurisdiction there had been a recent decision by one court which another could not conscientiously assent to, a practice had crept in for each court to follow its own independent judgment, more especially if there was no means of questioning by an appeal the prior decision. Moreover, if the point was one rather of discretion and practice than of principle, one court felt itself at liberty to disregard its predecessor's conclusion when exercising the same latitude. And it occasionally happened that a court was so strongly persuaded of the injustice, inexpediency, and shortsightedness of a long-established rule as to overrule and reverse it; but this was only done when no hardship would thereby be created to any interest, and the change of practice would not operate unjustly. The extent to which precedents should bind a court is indeed subject to so many nice qualifications arising out of the subject-matter, the time, and the occasion, that it is scarcely possible to define it except by saying that *prima facie* it is the duty of all courts to follow a precedent unless there is some over-

whelming reason against it; and this habit is all the more salutary when there is a legislature at hand easily accessible and ready to redress all kinds of injustice, whenever such a course becomes by change of circumstances or otherwise likely to work oppression. By this discharge of its duty the affected attributes of omniscience and infallibility, sometimes ironically imputed to the law, cease to keep alive for any length of time any flagrant injustice or obsolete dogma.[1]

Adherence to precedents assumes means of knowledge of the law.—While, therefore, adherence to precedents is not only justifiable in the courts, but salutary to the public, much of this justification and safety depends on the extent to which the precedent had become known and acted upon. If the existence of the precedent had been concealed and inaccessible to the public, or, what is the same thing, to the advisers of the public, the reason of blindly following it loses most of its force and of its merit. There is, and can be, no abstract merit in following any precedent as a precedent; it is on the assumption that the precedent had been acted upon, that men's conduct had been regulated by it, and men's titles reposed upon it, that all its virtue depended. But when the precedent lay hid in the forgotten files of the court, and the knowledge of it had never been diffused among the public or

[1] BACON says we should avoid such precedents as smack of the times.

VAUGHAN, C. J., in his reports, says that "in cases which depend on fundamental principles, from which demonstrations may be drawn, millions of precedents are to no purpose."—*Re Wales*, Vaugh. 419.

LORD MANSFIELD, C. J., said "when an error is established and has taken root, upon which any rule of property depends, it ought to be adhered to by the judges, until the legislature thinks proper to alter it, lest the new determination should have a retrospect and shake many questions already settled; but the reforming erroneous points of practice could have no such bad consequences, and therefore might be altered at pleasure when found to be absurd and inconvenient."—Robinson *v* Bland, 1 W. Bl. 234.

BLACKSTONE says precedents must be followed, unless contradictory to reason or the divine law.—1 *Bl. Com.* 69.

ELLENBOROUGH, C. J., said: "God forbid that when conscience points one way, I should follow precedent the other."—23 *Parl. Deb.* 1084.

DE THOU was in the habit of saying that precedents were good only for "the individual plaintiff or defendant."—1 *Bac. Works*, 808 n.

the advisers of the public, then little can be urged in its favour, and it must be left to be dealt with by the ridicule of cultivated minds, who owe no allegiance to the law and its methods. It would be better in that view that the judges and courts should at once invent and decide for the occasion, and follow their untutored reason. If to the public all is guesswork—if the legislature or the government take no pains to diffuse some knowledge of the law, or to see that some knowledge of it reaches the public—it can be of very little consequence to the latter whether in searching for a conclusion the courts legislate or expound. The courts may just as well act upon reasons that will be acceptable to the present generation as to the past. The defence of precedents is thus bound up with the consideration how far the government acquits itself of the duty of spreading a knowledge of the laws among the people whom those laws solely concern, and this more properly belongs to another and later head, namely, that of codification.

Presumption that every one knows the law.—It is one of the radical conditions underlying the existence and administration of all laws, that every citizen is presumed to know enough of the law so as not to set up his ignorance as any excuse for his violation of its rules. The maxim is *ignorantia juris neminem excusat.* The meaning of this maxim has often been hastily assumed to be, that every person is presumed affirmatively to know what the law is on any particular subject that may arise; and hence it is often explained to be a somewhat harsh assumption, if not a palpable historical fiction, inasmuch as every one's daily experience proves that few persons know the whole of the law, or are ever likely to do so; and that beyond those few, very few indeed know with any reasonable certainty more than a part of the entire law. Yet the law must be administered on the principle that every one must be taken conclusively to know it, without proof that he does know it.[1]

It has sometimes been put forward as a reason in defence of this maxim, which to laymen seems somewhat in need of justification, that all are presumed to know the law, because they were present through their representatives in parliament when such law was passed. Such a reason,

[1] *Per Tindal*, C. J., MacNaughton's Case, 10 Cl. & F. 210.

however, could only apply to a small portion of the law, for in any one generation it is but a small portion of the law that is declared by the legislature. And, apart from this, the mere fact of the representatives passing a law does not necessarily imply any knowledge in the constituents of the details of such law; it can only excuse those who passed it and prevent the principals from complaining of the acts of their agents.[1]

Reason of this maxim.—The real meaning of the maxim is not that every person is presumed to know the law, but merely that, in any case of alleged violation of the law, no person shall be heard to set up the excuse, that he was ignorant that any conduct of his was in violation of the law. And this maxim so understood is essential to the due administration of all laws. It is founded on necessity, and like some of the elementary truths of mathematical science, must be assumed, not because of any positive reason which can be rendered, but rather because of the negative reason, namely, that there is no reason why it should not be so.

If it were once allowed in answer to any complaint of violation of the law to set up the defence of ignorance, then there must be gradations of ignorance and gradations of default, and a preliminary inquiry in each case as to whether such ignorance was real or assumed, culpable or innocent. One would be entitled to urge that he had never received any education at all; another, that he was about to study the law, but had not yet advanced sufficiently; a third, that he had made an effort to learn, but could find no sufficient teachers; a fourth,

[1] It was said so far back as the time of Edward I., that the reason why no one should excuse himself for ignorance of the law was, because every person was represented in parliament.—*Year-Book*, 39 Edward I., T. Pasch.

HOBBES insinuated that it was not apparent why every man should be bound to buy the Book of Statutes, or search at the Tower, or understand the language in which they were written.—*Hobbes's Dial.* p. 599 (ed. 1750).

HOOKER said it was against equity, that one should suffer from a law which he had never by himself or others mediately or immediately agreed to.—*Eccl. Pol.* But HALLAM said this doctrine in its literal sense is incompatible with the existence of society.—1 *Hallam, Const. H.* 222.

that he had to get his living, or had no sufficient means, and so had no leisure; a fifth, that he had applied to the wisest person within his reach, and had been misled by the information he received; and a sixth, that he had made careful inquiry, and found the highest authorities equally wise and weighty on both sides, and was unable to decide which should be his guide. It might be asked, if such inquiries were permitted, what materials exist to enable any court satisfactorily to dispose of them. The interior of a man's mind is beyond the reach of inquiry. To endeavour to discover the secret springs of thought—the degree of reflection given to any one subject—the elements of self-education, or the impulse given to the mind by the common knowledge provided by the schools—with what possible certainty can any third party attempt to solve so inscrutable a problem? Hence the courts wisely abandon the impossible task, and treat all alike as incompetent to set up any such defence, leaving each to find out for himself and in his own way whatever he wants, and to take the risk of his want of knowledge as it may turn out.[1]

But though no one is allowed in any legal proceeding to set up his own ignorance of law as an excuse, it is very different, where an error of fact is involved, and lies at the root of the supposed violation of law. An error of fact may entirely vitiate an agreement between two parties and prevent that which was supposed to be an agreement from having any binding effect. The effect of a mistake of fact is indeed difficult to be stated, apart from the various situations in which one's rights and wrongs arise. It is enough here to say, that while a mere mistake of law generally forms no ingredient in the remedy of civil courts, and often small even in criminal courts, yet a mistake of fact may be so mixed up with the foundation and administration of

[1] This theory, however, was departed from in a case where a man, in a ship on the coast of Africa, did an act, on June 27, for which he could not have been punished except under an Act of Parliament which had passed on the previous May 10, but the knowledge of which statute could not have reached him at that remote place. The judges concurred, that it would be unjust to punish him, though technically he was guilty, and recommended a pardon to be obtained. —*Bailey's Case*, R. & Ry. 1. An exception to the rule, that ignorance of the law is no excuse, exists in the case of a judge who, mistaking the law, inflicts injustice on another.—R. v Picton, 30 St. Tr. 831, 914.

rights and remedies, that it may be an important ingredient, as will be found illustrated at length in various occasions hereafter to be mentioned.

Distinction of law and equity.—Some notice is also due in this place to a notable distinction, which had long prevailed in English law between courts of equity and courts of common law. Though it is usually of small consequence to suitors by what name a court is called, provided the thing it dispenses is justice, or near it, yet the distinction referred to had gradually risen from a mere technicality of procedure to such prominence as not only to derange the general machinery, but to warp and distort the public mind. The public were sensible only of the mischief, and unwilling to discern any benefit from seeing the law administered by two broadly-marked divisions of courts, always having imperfect sympathies, and sometimes in open conflict with each other—one court following rules which the other ignored, and which it was impotent to comprehend, to accept, or to act upon—one court giving a judgment, and the other court next day pulling it to pieces —one court putting a man into possession, and the other court turning him out of possession—one court dismissing a suitor as blameless, and the other court seizing him and thrusting him into prison as a punishment for his contempt.

The mental confusion created among bystanders by such proceedings was inevitable. First it taught the public to believe, that law was not equity, and equity was not law—that what was just in one court was unjust in the other—that what was told them by one court was only half the truth—that they must invoke the powers of a second court, before they could hope to know the whole of their rights and wrongs—not to speak of the evil effect produced on the suitors by the reticence and taciturnity of each court as to the remedies open to them in the other. Secondly, the expense and delay to the public were thereby doubled, because the details of both procedures were too voluminous to be mastered by one set of practitioners, and as they could not undertake to manage both, they confined themselves to one only. Double costs and indefinite delay thus resulted to litigants. So many were the evils and so few the advantages, that the current of public opinion sapped and mined this wall of separation till it fell. For centuries

the profession failed to see itself as others saw it. Yet the dominion of this leading subdivision was so durable and so extensive, as to leave permanently stamped on the professional mind distinctions, contrasts, and phrases which it must prove tedious to unlearn. It was pernicious to create and perpetuate the belief, that law did not include equity, and that equity was something outside and superior to law. If both had limits, and both had to be administered by courts having, if not concurrent, at least coequal authority and power, the best policy was not to keep them so wide apart.

But though the administration of the law by two separate courts which meted out justice with an air of rivalry rather than of co-operation was attended with mischiefs, there was to be set off against this an incidental advantage on the other side. In the great majority of cases the result was nothing else than a subdivision of labour, though operating in the most vexatious way, and hence the tendency was to make the judges and practitioners more skilful in the particular work with which they were familiar.

Most of the evils arising from this subdivision of courts into courts of equity and common law were put an end to in 1875, and the history of the origin of the Court of Chancery as a court of equity is now a matter rather for antiquarians than for lawyers. England was said to be the only civilised country where the separation of equity from law was kept up, for the Court of Session in Scotland, and the courts of other European countries allowed of no such distinction. But Bacon and a long line of illustrious chancellors thought the distinction a blessing rather than an evil. The history of the Court of Chancery goes back for many centuries. Whenever courts of law, as courts in all countries are apt to do, adhered too closely to the letter of their rules, and a violation of the sense of justice resulted, the dissatisfied party, so far back as the time of King Edgar, appealed to the king.[1] The king referred the matter to his chief officer, and the Lord Chancellor coming to hold that position, was able to supply defects from time to time, until his course of action gradually settled into a system, and became known and resorted to as peculiarly applicable to certain classes of rights. The select council in the time of Henry I. took cognisance of hardships which the ordinary

[1] Leg. Edg. ch ii.

judges could not relieve.[1] And Edward I. remitted petitions which prayed extraordinary redress to the Lord Chancellor and Master of the Rolls, directing them to give such remedy as appeared consonant to honesty.[2] The Court of Chancery was in working order in the reign of Edward II.[3] In the time of Edward III. it was a court of ordinary jurisdiction, directed by his writ to administer matters in the grace of the crown.[4] And in that reign the Court of Chancery, like the Court of King's Bench, ceased to follow the king, and thus acquired stability and strength.[5]

The introduction of the practice of creating uses of land or trusts in the time of Edward III. gave an additional impulse to the business of this court, and notwithstanding the opposition of Lord Coke to the practice of courts of equity nullifying judgments of courts of law (and which was one of the articles of impeachment against Wolsey), the jurisdiction of the Court of Equity was, after due examination, confirmed and consolidated under Lords Ellesmere and Bacon. The future history of the jurisdiction was nothing but a natural development, the courts of law falling back by degrees on the old lines, and the courts of equity feeling their way, whenever there was an opening to administer relief as soon as the original courts under their construction of accepted rules failed to provide any. It was found that the ecclesiastical courts could not deal effectually with all the suits and actions arising against the executors and administrators of a deceased person, and that there was need of a machinery for consolidating all the litigation arising out of the contracts and undertakings which a dead man left imperfect, and so a court of equity allowed an administration suit by which the extrication of all liabilities between the dead and the living could be undertaken under its own immediate superintendence. From this class of circumstances alone a fruitful business sprang up. The ecclesiastical courts, moreover, not content with jurisdiction over wills and testaments, and marriage, for which they had, according to mediæval views, a colourable ground of interference, once entertained suits for debts and breaches

[1] Hardy's Close Rolls, p. xxv. [2] Disc. on M. R., p. 86.
[3] 1 Camp. L. Ch. 206. [4] Hardy's Close Rolls, xxviii.; Writ, 22 Ed. III. [5] Parkes' C. of Ch. 34.

of contract, claiming to administer relief *pro læsione fidei.* Blackstone says these courts so acted from the time of Stephen till late in the fifteenth century.[1]

Equitable jurisdiction as to trusts.—The case of trusts, however, is the most conspicuous instance of the manner in which courts of equity came to supply the deficiencies and correct the pedantries of courts of law. A trust, as will be seen hereafter, is only a device for separating the ownership of lands or goods into two parts, whereby the substance or benefit of the property is given to one called the *cestui que trust* or beneficiary, and the right of management or custody to another, called the trustee. Good reasons must exist for this subdivision of ownership in the circumstances of every civilised community, more especially in connection with the gift and bequest of property after the death of the testator. Such a practice arose in the Roman law out of a natural desire of testators to evade the Voconian law, by which a qualified citizen only could be made heir, and thus an only female child might have been left destitute, unless the father could give the property to some one in trust for the benefit of that child. And Augustus recognised the justice and compelled the performance of such a trust. In England also, before the time of Edward I., an owner from similar motives gave even during his lifetime estates to feoffees for uses with a trust or confidence to reconvey them after death to himself or his heirs, though the courts of law could not give a remedy if the feoffee omitted to execute his trust.[2] The clergy had the merit of putting the subject on its right footing, for they required a friendly hand to hold property for their benefit, in order to evade the provision of Magna Charta and later statutes prohibiting gifts to religious houses.[3] The laity had equally urgent motives, such as the object of defeating creditors or attainder, or providing for younger children. Any such arrangement as a trust, however, courts of law, with a narrow-mindedness approaching to pedantry, professed not to comprehend. They refused to deal with any one but the feoffee, and treated all representations of these ulterior interests in the back-

[1] 3 Bl. Com. 52. [2] 2 Bl. Com. 271.
[3] Mag. Charta ; 9 Hen. III. c. 36 ; Stat. de Relig. 7 Ed. I.

ground as a fraud. They selected the manager or trustee as for all purposes their owner in fee, leaving him to do as he liked with his so-called confederates in the collusion. By this course a trustee was deemed absolute owner, and was entitled to appear as such in all the phases of litigiousness before courts of common law, and he was not deemed bound to account before them to the other party in the trust, or acknowledge in any way his existence; the consequence of which was that trustees went entirely without check or control till the time of Henry V. The courts of equity saw their opportunity, and, the chancellor being usually himself an ecclesiastic, borrowed the practice of the ecclesiastical courts which never hesitated a scruple as to the powers they would exercise over the living or the dead, invented the writ of subpœna, by which they summoned the trustee before them, and made him convey the estate or execute the trusts, or take proceedings at common law, according to the situation of affairs.[1] This subpœna, though at first deemed a dangerous novelty (said to be the invention of Sir John Waltham, M. R., in the time of Richard II.), after some fluctuations of treatment, became a settled practice in the time of Edward IV. It was a searching process, requiring the defendant's personal attendance under a penalty of commitment for contempt—thereby in itself forming a marked contrast to the mode of commencing and carrying on actions at common law, where the appearance of parties was not necessary, and indeed they could not be heard.

Not only was the case of trusts the most conspicuous occasion for the firm ground taken up by courts of equity, but other miscellaneous matters were also appropriated, such as the relief allowed in cases of fraud and accident. Coke quotes a couplet of Sir Thomas More, that "three things are helped in conscience—fraud, accident, and things of confidence."[1] And when the conscience is once resorted to, no one can fail to see that there must be many hardships occurring under the most admired rules of law, which are hateful to the sense of justice, and which any one skilful in applying conscientious thought, and with suitable opportunities, can intervene to meet with great

[1] 1 Spence, Eq. Jur. 443. [2] 1 Roll, Abr. 374; 2 Swanst, 160, n.

effect. He may thereby appease the smart of many an unredressed wrong.

Some vague notions of distinction of law and equity.—Some writers in accounting for the distinction between law and equity, confounded equity with that rule of construction which in all courts must prevail, of supplying some meaning, which the letter of the law in strictness either omits or indistinctly recognises, and in this sense, as Lord Bacon once argued, there is no law under heaven which is not supplied with equity.[1] Plowden so used the word.[2] And it is this sense which equity commonly bears among Greek and Roman lawyers and public jurists;[3] for they speak of equity as the informing soul of law, and moderating and correcting its rigour. The Roman prætor seems to have acted in this spirit.[4] And some English authors treat this as at least the characteristic feature of equity.[5] There is much looseness indeed in this view, yet all seem to admit that there is a limit even to moderating the written law, whenever that law is precise and definite enough to be understood, for then no court, even of equity, can interfere further; and courts of equity as well as courts of law refuse to create a rule which cannot by fair construction be derived out of the general and accepted language of some other admitted rule or statute. And Blackstone corrected, as Lord Eldon also repudiated, the popular notion, that courts of equity were not bound by precedent like courts of law, but may vary like the chancellor's foot, or according to his discretion; in that respect both courts, as he showed, acted alike.[6]

Origin of court of equity in usurpation of legislative power.—In all courts and in all ages judges show different

[1] Bac. Works, Arg. Marches. [2] Plowd. 465. [3] Arist. Eth. Nic. b. v. c. 14; Puffend. b. v. c. 12, § 21; 1 Domat, Prel. 1, 1, 23; Cic. Orat. § 37. [4] 1 Heinec. El. Pand. 1, 1, 42. [5] 1 Bl. Com. 61; 3 Ib. 419; Dial. Law, I. c. 16; Finch, Law, 20. [6] 3 Bl. Com. 432; 2 Swanst. 414.

It was under this common delusion, that JUNIUS denounced Lord Mansfield for trying to turn a court of common law into a court of equity, in order, as was insinuated, that his discretion might be without limit.—*Junius, Lett.* 63.

BURKE, on the other hand, extolled Lord Mansfield for his liberality.—Rep. H. C., R. *v* Hastings, vol. xiv. p. 385.

dispositions as to the extent of accommodating the letter of the law to the varying subject-matter of the particular case; for this is part of human nature, and of individual temperament, rather than an incident of any one species of jurisdiction. The rival schools of lawyers in the Augustan age of Rome, the Sabinians and the Proculians, divided the profession from Augustus to Hadrian, one adhering to the letter of the law, and the other to the spirit, till the perpetual edict closed the controversy.[1] It is true that in England, instead of this qualifying and liberal element remaining in each court, and accompanying the exercise of each jurisdiction, it came to be separated to some extent, and vested in a distinct court, giving rise at last to a marked line of demarcation, separating co-ordinate and rival courts dealing with the same subject-matter. This has been accounted for by Blackstone with much truth as arising from the accidental circumstance of the chancellors, the great officers of state, and nearest the king's person, being for many ages either ecclesiastics or statesmen, neither of which classes has ever been very scrupulous in the exercise of power; and they stepped in to fill up obvious defects in the ordinary courts by exercising what would now be deemed and justly stigmatised as legislative power, though in early times this kind of judge-made law was often not only expedient and useful, but in most senses necessary. The proper course was not followed, if indeed it was in earlier times capable of being appreciated, namely, that of leaving the legislature to supply all defects which the courts of law did not, or which the judges thought they could not fairly remedy under their existing powers. The statute of Westminster Second in the time of Edward I., enabled the clerks of chancery to issue writs adapted to the case if such case did not exactly suit the established form; but the judges professed themselves to decide all questions about writs, and did not take pains to improve their opportunity.[2] Moreover, when the defects were discovered, these ought to have been admitted and confessed on all sides. Instead of this, the distinction and anomaly went on widening and deepening. The encroaching power of chancellors grew with what it fed upon, knowing that

[1] Gibbon, Rom. Emp. ch. xliv.
[2] 13 Ed. I. c. 24; 1 Spence, Eq. Jur. 240.

the popular conscience was on its side: and the anomaly has been an unreasonably long time in dying out. Both the common law judges and the equity judges for ages refused to see and confess that what they disputed about was caused by one of them arrogating legislative functions. It was not indeed till comparatively modern times that the proper boundary between the judicial and the legislative powers was clearly seen, acknowledged, and firmly acted upon. The prejudice of ages had led all courts of justice to believe that each particular legislature at some remote and distant antiquity had foreseen and provided for every conceivable species of wrong and injustice, and hence it never occurred to any of them that any fresh intervention of the legislature was necessary: yet they were ready to tell a discontented party that he must go without a remedy. The usurpations therefore of the Court of Chancery were only an illustration of the confusion of ideas pervading the times as to the origin and function of courts of law, and as to the province of the legislature. The usurpations were salutary, though they should have stopped sooner. The legislature should have been invoked at an earlier period. The result is, that in modern times what seems so incomprehensible to bystanders would have been more intelligible, if the distinction between law and equity had been represented as nothing more than this, that the jurisdiction of the courts had become subdivided, each set taking charge of a separate branch of business. How or why the separation arose could never be of much consequence except to lawyers, for there is nothing in which the public take less interest than the divisions and apportionment of jurisdictions. And while in reviewing the rise and continuance of the anomaly we are warranted in saying that the courts of law acted more regularly according to modern notions, and the Court of Chancery with more spirit and propriety according to ancient notions—the one in declining and the other in usurping a function which could now only be conferred by the legislature—the long separation of jurisdiction was attended with the solitary advantage that it gave that precision of thought on certain subjects which a subdivision of labour usually brings about.

Codification of laws, how far necessary.—The details of the law having grown unwieldy and incongruous, a natural

desire has grown up for many generations to have some codification or well-arranged summary of the whole, such as may be known and read of all men. The public being presumed to be bound to obey these laws in their minutest details, and incurring pains and penalties often proportioned to their ignorance—that ignorance being costly, and yet inexcusable—and the very end and object of all law being that it should be intelligible and accessible to inquirers, the question has been asked, and has never yet been answered, How it comes that English subjects have never been provided with reasonable means of satisfying the most moderate of moderate desires after this branch of useful knowledge?[1] While the statute law is bulky and incoherent, the same is equally true of the common law, or unwritten law, which exists in no definite written form, but is collected by induction and reflection, as occasion calls, out of the still more bulky decisions or precedents, as well as treatises and digests accumulated during centuries. The common law is now the essence of hundreds of volumes of legal decisions, and in its concentrated form floats like a tradition in the minds of generations of lawyers, rather than is embodied in any one book or set of books. The digests made from time to time are merely collections of the points supposed to be decided by the courts, and expressed in a more or less abstract form for convenience of reference or as aids to the memory.

As the municipal law consists partly of statutory law and partly of non-statutory law, if a code means a complete collection of general rules of law, so far as these can

[1] MONTAIGNE said, "What can be more strange than to see a people obliged to obey and pay a reverence to laws they never heard of, and to be bound in all their affairs, both private and public, as marriages, donations, wills, sales, and purchases, to rules they cannot possibly know, being neither writ nor published in their own language, and of which they have of necessity to purchase both the interpretation and the use."—*Montaigne*, b. i. ch. 22.

MONTAIGNE also said that in his time they had in France more laws than in all the world besides, and more than would be needed to govern all the worlds of Epicurus. And he thought it would be better to have no laws at all, and to imitate those nations that chose any stranger passing by to sit and decide their disputes.—*Montaigne*, b. iii. ch. 13. And that lawyers' books upon books, interpreting interpretations, were endless and sickening.—*Ib.*

be expressed in writing, then, in order to construct a code, it will be necessary to methodise the materials of both descriptions, each being complementary to the other, and neither being complete in itself. To say that such a work could not be accomplished is to say, that judges and courts decide cases on some secret and inscrutable grounds which are not capable of being expressed in articulate language, and not fit to be heard and read of men. But the increasing amplitude of discussion and elaboration of reasons contained in all modern judgments of our courts, altogether negative such a conclusion.[1]

What is a reasonable form of codification.—If it be no excuse for any citizen that he is ignorant of the law, if ignorance is costly to the national exchequer, it seems to follow, that the government of a country ought to take some trouble to facilitate the knowledge of that law and bring it within the reach of all, and in such a shape as to be accessible to any one who devotes moderate industry and intelligence to its study. No citizen can in the course of his avocations, whatever these may be, wholly fail to gather some sound views of the great outlines of the law, for the business of life cannot proceed a step without regard to those leading principles, and many have some additional glimpses from their services as jurors and witnesses. But over and above what each citizen cannot help knowing, there may reasonably be provided also some facilities for securing greater precision and detail to such knowledge. It cannot indeed be expected, as Montaigne seems to have thought, nor is it desirable, nor, if desirable, is it practicable, to make every man his own lawyer, for the

[1] LORD HARDWICKE, in 1761, said that "in the best policied countries abroad judges did not give reasons of their judgments in public and openly; but he always looked on this as one great security. Some persons prefer the reputation of their understanding to that of their conscience, and would be ashamed to talk nonsense to the world in support of a judgment that they would suffer themselves to give silently."—15 *Parl. Hist.* 1011.

When a statute of Edward III. ordered pleadings to be in the English tongue, the reason given was that litigants might know what was said for and against them, and that every man of the realm may the better govern himself without offending against the law, and the better save and defend his heritage and possessions.—36 Ed. III. St. 1, c. 15.

law must of necessity always be enough for a separate profession, engrossing the labours of a life. One must be made a lawyer, and is never born a lawyer. As Selden said, unless the science be professionally studied, it will breed nothing but overweening conceits.[1] Yet no man can fulfil the duties of any of the higher stations in society fitly, without a large and tolerably accurate acquaintance with the general principles and even many of the leading details of the law. It must always be rather in the correct application of those principles, than in the knowledge of the principles themselves, that the lawyer will differ from the layman, as the familiar manipulation of the tools is something distinct from an accurate knowledge of the results obtained by their use.

What is meant by a codification is nothing else than the methodical arrangement of the whole body of the law, whether statutory or non-statutory, which now lies scattered over many volumes, and has to be excavated piecemeal, with great labour and much risk of error, from the accumulated mass of undigested decisions and practices. Whether a code when completed should have the authority of a statute or not, is a subsidiary question; but that a code would render possible a more familiar acquaintance among the public with its details, needs no argument. All that would in a code or a digest be valuable to the public would be the summary it included. A code necessarily implies a methodical arrangement of matters, and considerable brevity in the enunciation of leading rules or principles. It is true that brevity [2] is a virtue not to be sacrificed

[1] Barr. on Stat.

[2] "It is commonly required that the language of the law should be particularly distinguished by brevity. Certainly brevity may be extremely effective, as is clear from the examples of the Roman decrees and edicts. But there is also a dry, inexpressive brevity adopted by him who does not understand the use of language as an instrument, and which remains wholly ineffective. Numerous examples of it are to be found in the laws and records of the middle ages. On the other hand, diffuseness in law authorities may be very exceptionable, nay, wholly intolerable, as in many of the constitutions of Justinian, and in most of the novels of the Theodosian code: but there is also an intelligent and very effective diffuseness, and this is discernible in many parts of the Pandects."—*Savigny, Voc. of Age* (tr. by Hayward, 41).

BACON said that "certainty is so essential to law, that law cannot even be just without it. If the law give an uncertain sound,

to precision; but so far as it is compatible with precision, then brevity should characterise a code thus far, that where the same distinct meaning can be put in one sentence, it is a waste of time and trial of patience to expand it into two or three. The best method of arrangement is peculiarly for the consideration of experienced, methodical, and clear-sighted intellects, gifted with the faculty of clear expression. If the objection to a code be the difficulty of finding several to agree in any one statement or proposition, the mode of overcoming that difficulty was discovered by Theodosius when he commissioned his code. He directed that where several minds were engaged in the same work, and were in danger of a conflict of opinion, the opinion of Papinian should be that which should prevail.[1] This objection, therefore, may be obviated without difficulty by finding a Papinian.

Usual objections to codification.—It has been urged that codification would effect no alteration of the law, and would in truth amount to nothing more than collecting it into more convenient parcels, and providing the lawyer with better and sharper tools to work with. But if the code would, over and above the latter advantage, provide the general public with a simpler and easier access to its contents, this is so inestimable a boon, and one which every government should favour, that the particular advantage to the profession of the law may be altogether disregarded, or, at least, it need not intercept the benefits enuring to the rest of the community. If the sole object of codification were to benefit the legal profession, and not the general public, then it might with justice be argued, that the medical and the clerical professions might equally claim at the hands of the state a simpler and easier way of mastering their respective subjects, which are also of the greatest utility. But if the crowning advantage of a code

who shall prepare to obey? It ought therefore to warn before it strikes. It is well said also by Aristotle, that that is the best law which leaves least to the discretion of the judge, and this comes from the certainty of it."—*Bac. De Aug.* b. viii.; *Arist. Rhet.* i. 1.

OLIVER CROMWELL being bent on a reform of the law, and having set his parliament to make the laws more plain and short, complained that they had taken many months to settle the meaning of one word, namely, "incumbrance."—3 *Carlyle*, *Crom.* 274, 357.

[1] Theod. Code, b. i. tit. 4.

be, as it is intended by its most judicious advocates to be, for the better diffusing of a knowledge of law among the intelligent part of the community, and thereby educating the public mind in such a manner as to avoid illegal acts, and so lessen the public expense and the costly apparatus required to detect and punish them, then this is so clearly a matter of imperial concern, that no government can successfully excuse its neglect or delay. Any immediate expense to the nation caused by labours so arduous, would be, sooner or later, more than compensated by the greater respect and interest displayed towards the laws, and less outlay to the national exchequer in enforcing their observance.

Complaints of intelligent citizens as to want of a code.—On this subject it is best to listen to the comments of the cloud of witnesses who represent the cultivated intelligence of the country, and of its most active and useful citizens, rather than to listen to the views and opinions of lawyers, who cannot be expected to see themselves and the work they are employed upon as others see them. It is well to hearken to the voice of amazement and scorn that is heard, whenever the confused and undigested mass of English law lies open to popular scrutiny. Filangieri, in 1780, thus apostrophised England on the subject of its laws and their crudity:—"After having instructed, enlightened, and astonished Europe with your inventions, your arts, your productions, and your wonderful discoveries, is it possible your legislation should be so obscure? Formed out of many barbarous absurdities of your ancestors, of the extravagance of the Gothic feudal system, in direct opposition to the principles of your adorable liberty: of usages and customs whose origin is not even known: of new laws, often contradicting old ones: of the decisions of your courts with the effect of laws: of useful establishments united with destructive ones: of evils and their remedies: of numerous sacrifices for your independence, and as many instruments of despotism: it appears to the eyes of the philosopher an immense mass of confusion, out of which it may be difficult to extract a remedy that would remove the defects of your constitution and preserve your liberty."[1]

[1] Filang. La Sci. d. Legisl. c. 10.

HALLAM—"The vast extent and multiplicity of our laws have

Yet the question of a code has been so mixed up with its supposed effect on the legal profession[1] that the benefit to the public, for whose sole use it should be intended, is often altogether lost sight of. In such a project the

become a practical evil, which, between the timidity of the legislature on the one hand, and the selfish views of practitioners on the other hand, is likely to reach in no long period an intolerable excess. We accumulate statute upon statute and precedent upon precedent, till no industry can acquire, nor any intellect digest, the mass of learning that grows upon the panting student, and our jurisprudence seems not unlikely to be simplified in the worst and least honourable manner, a tacit agreement of ignorance among its professors. It would be a disgrace to the nineteenth century if England could not find her Tribonian."—2 *Hallam, Mid. Ag.* 342.

In 1793 ROBERT HALL wrote: "The laws in their present state are so piled into volumes encumbered with precedents and perplexed with intricacies, that they are often rather a snare than a guide, and are a fruitful source of the injustice they are intended to prevent. The expense is as formidable as the penalty; nor is it to any purpose to say, they are the same to the poor as to the rich, while by their delay, expense, and perplexity, they are placed on an eminence which opulence only can ascend."—*Apol. Freed. of Press*, 102.

MACAULAY—"That we have been far too slow to improve our laws must be admitted. But though in other countries there may have occasionally been more rapid progress, it would not be easy to name any other country in which there had been so little retrogression."—3 *Mac. Hist.* 84.

FILANGIERI said the multiplicity of laws which oppress the courts of Europe and render the study of its jurisprudence as laborious as that of the Chinese language, which it takes twenty years to learn, is due to the practice of ignoring all general principles, and applying to each case of individual hardship as it arises a new law to avert such hardship.—*Filang. Sci. of Legisl.* c. 8.

J. S. MILL—"The law of England has come to be like the costume of a full-grown man, who had never put off the clothes made for him when he first went to school. Band after band had burst, and as the rent widened, then, without removing anything except what might drop off of itself, the hole was darned, or patches of fresh law were brought from the nearest shop and stuck on. Hence all ages of English history have given one another rendezvous in English law; their several products may be seen altogether, not interfused, but heaped one upon another, as many different ages of the earth may be read in some perpendicular section of its surface—the deposits of each successive period, not substituted, but superimposed on those of the preceding."

[1] The Chancellor D'Aguesseau is said to have on reflection stopped short in his career of law reform, in consideration of the numbers of the legal profession who would thereby be ruined.—1 *Butl. Rem.* 58.

profession of the law ought never for a moment to be regarded; for the law was made for the public, and not the public for the law. It cannot be expected that any code will, to a very great or material extent, dispense with the profession of the law, or render litigation unnecessary. No code can be so copious and minute as to satisfy and inform any mind, though gifted with the rarest intuition; nothing less than years of professional practice can ever render a lawyer master of his profession, with or without a code. Nor will a code dispense with the judiciary law, because this is merely the mode of reasoning on the principles supplied by the code, and adapting these to the cases that arise. Nor can a code be expected sensibly to diminish litigation, at least in civil cases, for this most commonly originates in temper, pride, revenge, malevolence, and the baser passions; and, while human nature remains as it is, suits and penalties can never cease from the land. The public seems to care nothing, whether the name of what it requires is to be a code or a digest, and yet this question has been seriously discussed as a preliminary difficulty. Such a difficulty can only be founded on the concealed hypothesis, that whatever is to be done is to be done for the benefit of lawyers alone. It has been forgot that the public would be satisfied with any summary well arranged, set forth in language of moderate perspicuity, issued under the authority of the state, which can always be relied upon to command at pleasure any amount of clear thought and perspicuous language on any subject capable of being addressed by one intelligent being to another. So long as this summary can be relied upon to help the public with its moderate details, it need not be considered what credit, if any, the legal profession need give to it. If it is right, it will soon establish its authority even with lawyers: if wrong, the same hand that made it wrong will soon make it right.

Why it is the duty of governments to codify laws.—The government of every nation accepts the duty and the burden of providing courts to accommodate litigants, and of judges to decide between them. The more obscure and inaccessible the law is made to those whose interest, duty, or desire it is to know as much of it as is compatible with other employments, the more judges and courts and

expense to the country, and the more vexation and loss and expense to the litigants are the immediate consequence. The two things are conspicuous each by itself, and it needs small intelligence to connect them. To the professional lawyer it must be a matter of indifference whether the materials he deals with are confused and intricate or methodical and easily understood, for the expense of elucidating and disentangling each complication falls on the client, be it much or little. If a lifetime must be spent in acquiring and retaining a good workmanlike knowledge, it is in the nature of things that the increased cost of the production must in some way be recouped by those who make use of so expensive a material. Though the public cannot reasonably expect to be provided with all the costly tools which lawyers must always use, there is a *minimum* which is essential to its own guidance and protection, and as to the limits and extent of which it is the best judge. If adults, who have capacity to comprehend how they are situated, are content to remain so much in the dark, guessing their way and taking the chance of its turning out the wrong way—if they cannot at present gratify a moderate demand lest the information supplied should not be so perfect and exhaustive as is conceivable for the expert, it is a matter for the public to settle for itself. The remedy lies altogether outside of the narrow precincts of a profession.[1] It is perfectly conceivable, that a little of such knowledge is a useful thing, and can never be a dangerous, injurious, or immoral thing. The alphabet and the elements—the primer and the outlines may be the common basis of every business, and must always be better than nothing at all; and are not the less useful and necessary, because somebody else can, by giving more time and care, carry their uses much further.

Not only are the subjects of the realm entitled to have some care taken, that they should have reasonable means of knowing the law, but there are thousands of justices of the peace constantly at work applying that law and enforcing it; and as to them, some consideration is preeminently due. They are not only left, like the rest of the

[1] HOBBES maintained, with much reason, that it was the duty of a government to make the laws as accessible to the people as the Bible was.

community, to find out the law as best they may, but often to pay the costs of mistakes which they make from time to time, and most of which arise from the confused state in which the law is found. And as they act gratuitously, and discharge important duties, which save the nation a great expenditure, it might be expected that some more precise and useful guide than copies of isolated acts of parliament would be presented to them.[1]

If laws are so obscure and intricate, that they cannot be stated in intelligible language, the time has come when they should cease to be laws. Lord Mansfield said that the property and daily negotiations of merchants ought not to depend on subtleties and niceties, but on rules easily learned and easily retained. But why this simplicity and clearness should be reserved for merchants alone, while the rest of the public are left to grope their way in the dark, it would baffle the wisest judge to explain. Erskine, with more comprehensive wisdom, said, that every man in civilised society has a right to hold his life, liberty, property, and reputation under plain laws that can be well understood.[2] And even Blackstone said, that law, being intended for universal reception, ought to be a plain rule of action, and not a science of the greatest intricacy.[3]

Codification has always been treated as public benefit.— The codification or digesting of the law of a community has always been marked in history as an epoch of progress, and even those kings and governors, who formed wise resolutions and held good intentions on the subject, have attracted the approving notice of mankind.[4]

[1] A statute of Henry VIII. ordered the justices of the peace diligently together among themselves to peruse, examine, study, and know the effect and true intent of the laws and ordinances as to vagabonds, embraceries, bowstaves, archerie, unlawful games, forestallers, victuallers, and to divide themselves into two or more, and hold sessions and inquire into all offences, &c.—33 *Hen. VIII.* c. 10. It is true the statute said the justices would be paid for their services, but all payment to justices was abolished, even in name, in 1854.—18 & 19 Vic. 126, § 21. The justices of those days were expected to act the part of bailiffs, and search out and seize malefactors.

[2] Ersk. Speeches.

[3] 4 Bl. Com. 417.

[4] Solon took care that his laws should be written on revolving tablets, and hung up in the Prytaneum for all the public to read.—*Diog. Laert. Solon; Plut. Solon.* The deep reverence of the Romans for law was maintained by their system of education, which obliged

Confused state of English law requiring code.—Yet the confused and chaotic state of the laws of England has

the children to repeat by rote the code of the decemvirs.—*Cic. De Leg.* ii. 4, 23. And Minos was praised by Plato for making it part of his system that the children should be taught the laws.—*Plato, Leg.* b. i. The passing of the Terentian law, when a universal demand sprung up among the Romans for a fixed body of laws, such that people could know what they were bound to do, and so as to limit the capricious decisions of the consuls, almost led to a civil war; and at last a body of deputies or commissioners were sent forth in galleys, magnificently adorned, to search for suitable laws in Athens, the wisest country then accessible to them, and the laws of the Twelve Tables were thus obtained, and written on brass tablets, and fixed in the forum.—*Livy*, b. iii.; *Dion. Hal.* According to Suetonius, Cæsar, disgusted with the uncertainty of legal opinions, had aimed at reducing the diffuse bulk of the law into a few volumes. *Suet. Jul. Cæsar.*

LIVY and TACITUS both complain of the infinite multiplicity of laws.—*Livy*, b. iii. ch. 34.; *Tac. Ann.* b. iii. c. 25.

TERTULLIAN praises the firmness of Severus for thinning the gloomy and intricate forest of laws without regard to their age or authority.—*Tertul. Apol.* c. iv. The Twelve Tables, at the end of five centuries, had swelled into 3000 brass plates, deposited in the Capitol.—*Suet. Vesp.* But the Tables were deemed in their day a wise and prudent selection of the best things in other existing codes.—*Tac. Ann.* b. iii. c. 27. In the fourth century the law books had accumulated so as to be many camel-loads.—*Eunap. in Vet. Edes.* 72. In ten centuries, GIBBON observes, "the infinite variety of Roman laws and legal opinions had filled many thousand volumes, which no fortune could purchase and no capacity could digest. The perpetual edict became buried under the weight of commentators."—*Gibbon, Rom. Emp.* ch. xliv.

FERDINAND OF CASTILE, in the thirteenth century, ordered a collection of laws, which was completed by his son, and called Las Partidas. A Chinese Emperor, about 1394, gained great renown by ordering the ancient and modern laws to be reduced into one body of 300 volumes, though it took a century to complete that collection.—*Du Halde*, 3 *Univ. Mod. Hist.* 725. The ancient customs of France and of Portugal were digested and collected so as to be memorable improvements.—1 *Butler, Rem.* 48; 8 *Univ. Mod. Hist.* 432. Historians relate how Denmark enjoyed a pre-eminent felicity in having its laws contained in one small volume so plain and intelligible that all could be understood almost without a comment, and lawyers were scarcely needed, and lawsuits were determined within a year and a month.—11 *Univ. Mod. Hist.* 659.

It was to satisfy the popular desire to know the law, that the government by degrees discovered that if the statutes were expressed in good native language rather than in bad Latin, or other foreign tongue, the result would be no prejudice, but much advantage to the people. The Germans dismissed the Latin language from statutes in

long been the ridicule of foreigners, the lamentation of our own intelligent legislators and citizens, a standing confession of weakness to many a government, which has constantly postponed to a more convenient season addressing itself to what Bacon said even in his time would be a heroic work—the making of a digest of the law.[1] It is true that the apathy on this subject has never yet been traced to any poverty in the material, and it has been shared by the classes whom a code would most sensibly benefit, and who seem only dimly conscious of a loss from never having enjoyed the possession. A petty state, having little to boast of, may well keep its laws, or what are called laws, hidden in obscurity. But a great country loses half its dignity and strength, when it cannot in an orderly and methodical way give some account to all whom it may concern of the main reasons, why its own social progress and the contentment of its citizens have been so well assured.

1235.—3 *Camerar. Hist. Med.* b. iv. ch. 5. The Castilians, a few years later, and the French in the time of Francis I., about 1539.—*Mariana*, b. xiv. ch. 7; *Mezerac, Hist.* b. iii. p. 446. A statute of Edward III. ordered the pleadings to be in English, so that parties might know what was said for and against them.—36 *Ed. III.* Our statutes were first printed in the reign of Richard III.

JAMES I., in a speech, recommended that the books of common law be written in the mother tongue, so that the people might not be kept in ignorance (1609).—*Wilson's Life of Jas. I.* 47; see *Barr. Stat.* 291.

WHITELOCKE, after the Restoration, complained that in his day, owing to the multiplicity of statutes, few students or sages could find perspicuity or clearness.—1 *Whitelocke, Com.* 409. And even GLANVILLE, so far back as 1188, wrote, in his "Treatise on the Laws of England," that to reduce in every instance the laws and constitution of this realm into writing would, in his time, be absolutely impossible, as well on account of the ignorance of writers as of the confused multiplicity of enactments.

A code does not dispense with the legal profession. When Frederick the Great published his code, he was so convinced of its being clear to the lowest capacity, that he prohibited professors and others, under severe penalties, from making commentaries, either on the whole law or on any part of it, and they were not allowed even to point out to youths whom they instructed the amplifications, limitations, or exceptions. And even advocates and judges were to cite in their arguments and judgments the pure text of the law and nothing else, the authority and *dicta* of doctors being viewed as an abomination.—*Pref. to Fred. Code.*

[1] De Augm. b. viii.

Definitions of some current phrases and words used in the law.—Now that the leading definitions, distinctions, and phrases current in legal literature have been noticed, it remains to give some definition of the technical meaning of one or two words, which constantly occur in every page of the law. Such are the words—*right, duty, obligation, equity, wrong, tort, crime, treason, felony, misdemeanor.* These are, so to speak, the tools and common implements used in manipulating the great variety of matters in which the law concerns itself.

Definition of "right," "duty," "obligation."—The words "right" and "wrong," when used as terms of legal art, have nothing in common with the same words as used by moralists and divines. With the latter these words indicate distinctions which, according to some, are innate, eternal, and indelible; and according to others are gradually formed by experience, and indicate those things that are found to be conducive to the greatest happiness of the greatest number, or the reverse; and so are objects of pursuit or aversion. A "right," in the language of the municipal law, means nothing else than a claim or demand which one individual can enforce against another, that is to say, so far as it is practicable for the law to enforce anything. As already explained, the law can enforce some specific thing only by operating on the reason of the individual, and inducing him voluntarily to do that one thing, lest some other worse thing befall him. In general it may be said that the word "right" is the correlative and counterpart of the words "duty" and "obligation." Whenever B is under a legal duty or obligation, this implies that some other person having a right, namely A, is legally entitled to punish or redress in some way the violation of that duty or obligation; but whether A, the injured party, or the crown, or any other prosecutor acting in the name of the crown, can vindicate the right, depends on the nature of the duty or obligation which has been violated, and the mode and degree of the injury.

These explanations will suffice for the three words "right," "duty," and "obligation."

Definition of word "equity."—Before passing from the word "right" it may also here be noticed that the word "equity," until a recent period, was used in an analogous

sense to the word "right." When courts of law were separated from courts of equity, the former courts entertained actions for vindicating rights, just as the latter entertained suits for enforcing equities. Thus a wife was said not to have a right to a settlement out of legacies bequeathed to her by third parties, because courts of law for some reason could not enforce it; but she had an equity, and courts of equity enforced it. So a man who was injured by a breach of contract or an assault had a right to recover damages, but he had not what was technically known as an equity, and hence he could bring an action in a court of law, but could not file a bill nor institute any suit in a court of equity. The explanation was, that for some reason or another the jurisdiction had become subdivided between these two courts, and each could administer only a partial remedy in many cases. But in 1875 the distinction between courts of equity and of law was abolished, and now all equity is merged in law—all suits and bills are included in actions—all equities are rights, and the Supreme Court of Judicature knows of one thing only as the foundation of actions and proceedings, and that is some right on the one hand, and some correlative duty or obligation on the other hand.

Meaning of word "wrong."—Another word of common use in the law is "wrong," and here, as already observed, it is used in a sense altogether distinct from moral wrong, and from the vague notion attached in popular language to that word. A wrong, in the eye of the law, is a violation of a legal right, duty, or obligation. Blackstone divided wrongs into private and public—the former including all that gives rise to actions, and the latter including all that gives rise to indictments and equivalent proceedings. As already defined, an action is the enforcing of a claim or demand which one individual has against another, and which by agreement they can between them at any time extinguish without risk or interference or question from third parties. On the other hand, an indictment or prosecution is the enforcing of some punishment for the violation of a duty or obligation, and which cannot be compromised between the wrong-doer and the sufferer alone, but the right of punishment and redress is vested in some third party or public functionary.

Meaning of word "tort."—The word "tort" is to some extent synonymous with private wrong, but is used to denote those wrongs only, or violations of right which do not arise directly out of any contract. When duties and obligations arise out of contract, as the duty of a debtor to pay his debt, of a contractor to perform his contract, the violation of such duty is called a breach of contract. But when the duty has nothing whatever to do with any contract or pre-existing relation between the parties—as the duty not to injure another when passing along the street or highway—not to allow a dangerous dog to bite another person, the violation of such duty is called a tort. "Tort," is not, however, synonymous with accident, for many accidents occur which the law cannot remedy, and it is often difficult to distinguish between a tort, or legal injury, and a mere accident, though the damage actually accruing to the sufferer may be the same. It requires an examination of many minute details of human affairs to trace this distinction. And when an accident is nothing more than an accident, and is not a tort for which the law provides any remedy, it is sometimes called *damnum sine injuriâ*—a suffering to some one, but a suffering for which nobody is blameable or responsible, and consequently, which has no remedy provided by the law.

Meaning of word "crime."—The meaning of the word "crime" has been, to some extent, already alluded to, under the head of "right, duty, and obligation." The technical sense of the word "crime" closely coincides with its popular sense. The word is seldom used as a term of legal art, except under one or other of its three denominations—treason, felony, and misdemeanour. It includes the most flagrant violations of right, duty, and obligation—flagrant as regards its motive and origin; and it is deemed not only hurtful to the individual sufferer, but to the rest of the public also. When A owes B a debt, and refuses to pay it, the violation of duty by A is deemed hurtful to B alone, or at least B may treat it as such, and discharge or waive it, abandoning his remedy, and if so, no harm is done, in the eye of the law, to the rest of the community. But when A stabs B, or steals B's property, though in one sense the violation of duty by A is hurtful to B alone, still, in the estimation of the law, the whole community is wounded

through his side, and A is made to undergo some punishment, irrespective altogether of what B may think or feel in the matter, and A cannot purge this delinquency by compounding with B. The punishment inflicted on A for a crime is sometimes a fine, or sum of money, but more frequently a term of imprisonment coupled with hard labour or whipping, and in a few cases the punishment is nothing less than death. It may therefore be stated broadly, that the differential characteristic of a crime is its depraved motive, and its being punished irrespective of the injury done to the chief sufferer, while a private or civil wrong is visited with no punishment at all *per se*, but merely with some compensation or equivalent to the individual injured, and to him alone.

Quasi crimes punishable by justices.—It is true that there are a few violations of right which are redressed in a summary way by justices of the peace, which fill an intermediate place between private, or civil wrongs, and crimes, or public wrongs, being sometimes punished without regard, and sometimes mainly with regard, to the person injured. Such cases on the border line are difficult to classify, but to one or other class they are usually referable, according to the purpose in view. Moreover, though a crime usually involves the violation of some right vested in an individual who is the sufferer, there are a few exceptional cases where the individual vanishes and nothing but an abstraction remains; but these cases admit, as will be seen hereafter, of no serious difficulties of classification.

Meaning of "treason," "felony," "misdemeanour."—The words treason, felony, misdemeanour, denote the three classes of crimes, and require here only a passing notice, for they are substantially mere matters of procedure, and belong more properly to that division of the administrative law entituled the judicature. The only importance which belongs to these terms in the divisions of the substantive law arises from the subject-matter, or the particular right which each crime, through its punishment, is designed to secure. It is true, as a general observation, that treason includes the offences against the executive government: while felony and misdemeanour used to be mostly confined to the crimes between subject and subject. But neither class is in modern times so confined. Some of the higher felonies

used to be called petty treason, but are no longer so. Some of the offences against the sovereign have been taken out of the category of treason, and ranked in the lower grades of felony or misdemeanour. The dividing lines are no longer scrupulously observed in respect of the object and subject-matter protected against these crimes. It was also once possible to distinguish treason, felony, and misdemeanour, by the severity of the punishment, and of the incidents both before and after conviction. All ages seem to have agreed in treating treason as a crime of the deepest dye that is known to the law, and therefore to be more severely punished than any felony, because it was aimed at the life of the sovereign, which is the keystone of the arch and the centre of the social fabric. To unsettle this is to let loose the elements of mischief far and wide. Hence a traitor was tried by peculiar tests of guilt, and the pains were more cruel and prolonged. There were agonies before death, agonies during death, and cruelties after death. After death the traitor's lands and goods were forfeited, and his blood was attainted; in other words, the relatives, however innocent, were deprived of their inheritance, not only of what would have descended to them immediately on his natural death, but what at later times might come to them from those related through the blood of the traitor as a link in the chain of title. From each and all of those superfluous cruelties, one by one, the law, with juster views of its proper province, has retreated.

Felony originally meant judgment of life and member, and the two things were often used synonymously.[1] Hence if a statute declared a crime felony, and assigned no punishment, a capital sentence was implied. In felony, confiscation was by escheat, while in treason it was by forfeiture. Felons were only a little less cruelly dealt with. On conviction their lands and goods were also forfeited in capital cases, and most cases were capital. In misdemeanours neither forfeiture of lands nor goods nor attainder of blood followed conviction.

[1] 1 Inst. 391; 2 Inst. 434; 1 Hale, P. C. 703; 4 Bl. Com. 94.

OF THE

SECURITY OF THE PERSON.

OF THE SECURITY OF THE PERSON.

First division of whole law is that relating to the body or person.—On a comprehensive view of the contents of the law, one or two subjects stand out conspicuous above the rest. The law is often loosely said to be mainly taken up with settling the rights of property, and of vindicating those rights—of acquiring, enjoying, exchanging, and parting with them during life, and losing them by death. But there are many important things besides property, which each individual values more highly. He finds himself a complex being, made up of body and mind, and what is of supreme importance to him is, how to secure the preservation of life, health, and all its natural capacities to the body. What he does is of less consequence to him than what he is and what he feels. He seeks, no doubt, for freedom to possess property. He seeks to have security of contract, security of marriage, security of speech, thought, and character, security of worship, and a share in good government. But nothing touches him so closely as himself. To avoid all personal pain and annoyance is usually his first thought, and while other thoughts also lead away to subjects only a little lower in his estimation, he never ceases to make his crowning consideration the preservation of his own body in life, health, and the full vigour of all the faculties of which life is the spring. Of all that the law can do for or against him the most interesting is that part, which consists in achieving the greatest positive comfort and health on the one hand, and on the other hand in avoiding as much pain and discomfort to the body as the law admits. This is the head and front of all law to him, and hence the first and highest division of the law is none other than that which is entituled, "The Security of the Person, or Body."

Twofold aspect of security of the person.—The first great division of the law, therefore, includes all those rights and liabilities which relate to the body, for though the body is nothing without the informing mind, yet it is easy to single out from the whole complex system of rights and wrongs, of duties and obligations, those that have for their professed and main object—the preservation of the body from wrong. And while its preservation from wrong is the capital head of this division of the law, such division has a twofold aspect. Each individual in seeking to protect his own body must also in the same breath undertake, as the price of that protection, to abstain from wrong to the bodies of others. He must give and take. He cannot enjoy immunity without allowing others to enjoy it also. If his body is injured, others must pay the price, or make up in some way the loss to him; if others suffer from his injuries to them, then he must pay the like price and make up to them the like loss. The rights, duties, and immunities are thus correlative; each has rights and duties as against all others; all others have rights and duties as against him. It is thus impossible to acquire a complete view of the sum of rights of each individual, without including the correlative rights of the others as against himself.

The law arrives at a complete protection to each individual, by placing some restraints on all others as well as himself, and these are so arranged, that each in turn is encircled as with a halo, consisting of duties and obligations on the part of all others towards himself, so that whatever mischances or misdeeds of theirs affect him, he can obtain his relief, whether it be much or little. This circle of rights, duties, and restraints makes up one complete subject, all the rays pointing to one centre; and while the account is given of one, it answers equally to the situation and the complement of rights of all others.

Chief heads of first division of the law as to security of person.—In order to comprehend more closely those laws that make up the protection of the body, it is natural first to see how each individual protects himself against interference of others. This is done by giving him a remedy against all others for each assault or injury, whether culpable or malicious, whether small or great, which results in mischief

to his body. Some injuries are done to the body by nothing worse than mere negligence on the part of others, that is to say, by something not designed or intended by third parties to injure, but rather the involuntary consequence of some neglect, which, though having at first nothing immediately to do with wrong to anyone, yet results in such wrong to some one. But the law not only provides against actual wrong or injury; it also provides against the mere intention or contemplation of wrong, though nothing actually comes of that intention. And this mere apprehension of evil obviously ought to take the first place in any account of the securities of the person. And not only is the body of each protected directly against intended wrong and actual wrong: but there are some restraints, which the law puts on each person by way of compulsory duties or obligations for the good of all, and though these involve no actual injury to the body, yet, inasmuch as they restrain one's liberty of locomotion and employment to some extent, they operate to qualify that consciousness of complete immunity which is felt by each. Still it is not enough to tell one how he is to be protected against intended and actual pain and injury, and also against these compulsory duties, unless he is told at the same time what is the price he is to pay to others for equal protection to them. That price consists in the pains inflicted on his own body, should he be so ill-disposed as to attempt any invasion or attack on the rights of others, in other words, it consists in all the imprisonments, arrests, whippings, and capital punishments, which the law awards to each one who will not take the trouble to leave others alone. Again, it will be more methodical at first to explain the above complement of rights as they are found centred in each normal man as the type of a human being arrived at full age, and in enjoyment of health and mental capacity. When these normal rights have been described, then there are four disturbing elements which produce a variation on such rights and duties. These arise out of the four natural events or conditions which may be predicated of each individual. Such are the variations arising out of infancy, sex, insanity, and death. The body of each is either infant or adult, is either male or female, is inhabited either by a sane or insane mind; and lastly, the body of each is

either alive or is overtaken by death. These four circumstances affect the complement of rights first described, and produce variations accordingly on the details of the primary law. And by first describing the rights of the normal man, and following the variations of these from infancy to death, through the intervening distinctions of sex and sanity, a complete account of all that immediately affects the human body of each individual may be given, and the cycle of such knowledge will thus only be completed.

Arrangement of chapters of first division.—When the subjects are methodically arranged in the manner already stated, they fall under the following natural heads or chapters, which will be treated in their order:—

I.—Protection of the body against threats and apprehended injury.
II.—Protection of the body against actual injury to the body by negligence of others.
III.—Protection of the body against actual intended injury, but not malicious.
IV.—Protection of the body against malicious, wilful and negligent acts which kill or wound.
V.—Restrictions owing to compulsory acts and duties strictly personal.
VI.—Protection of the body against want and destitution.
VII.—Temporary arrest and imprisonment other than on final judgment or sentence.
VIII.—Punishment of the body by death or pains on final judgment or sentence.
IX.—Variations in foregoing rights and duties caused by infancy.
X.—Variations in rights and duties caused by sex.
XI.—Variations in rights and duties caused by insanity and defective understanding.
XII.—Variations in rights and duties caused by death.

CHAPTER I.

PROTECTION OF THE BODY AGAINST THREATS AND APPREHENDED INJURIES.

Redress of intended or apprehended wrongs.—The weakness of the law is nowhere more conspicuous than in its feeble powers of preventing the commission of wrong. In this respect, as has been already observed, it differs essentially from the moral or divine law, which is directed towards controlling the conduct of man by intercepting evil at its source, and changing the secret thought before it ripens into action. To the law is assigned the narrower province of redressing wrongs only after they have been committed, and when the mischief can seldom be undone.[1] Nearly all the ancient legislators tried to make the law an engine of more ambitious range, akin to the divine, but that dream of empire has long been relinquished by modern legislatures. There is now no division of the law which supplies any machinery worthy of the name for directly preventing wrong, for this could only be done effectually by imprisoning men, and so keeping them physically incapable of evil—a remedy worse than the disease. It is true that one or two instances of preventive justice

[1] XENOPHON praised the laws of the ancient Persians for being directed rather to the prevention of crime than its mere punishment after it was committed.—*Xen. Cyrop.*

BECCARIA also says it is better to prevent crimes than to punish them; that this is the fundamental principle of good legislation, which is the art of conducting men to the maximum of happiness and to the minimum of misery.—*Becc.* ch. 41. But it will be found that modern governments find it impracticable to achieve this prevention of crime by any direct method, though they ought never to lose sight of it as a consummation and final conclusion of their efforts.

remain, but they practically amount to little else than making the remedy more prompt than it would otherwise be, if brought to bear in the ordinary course and at a later stage. In stating, therefore, what provision the law has made to secure the body, it is proper to begin with those that aim at the prevention or anticipation of wrongs of that class, or, in other words, the redress of wrongs, which are merely intended, but have not yet been accomplished.

A threat is a very common and familiar way of dealing with certain persons, and is often little more than an impressive mode of speech. It is obviously no part of the policy of the law to restrict this natural tendency. If it is vague and general, it may amount to no more than salutary advice, but if it is so used as to operate on a person of ordinarily firm mind, and produce an interruption to business or occupation, some reasonable check is required upon any excessive resort to such a mode of address.

What kind of remedy it is against threats of personal injury.—The legislature has not thought fit to treat as an actual crime, either the verbal threat to murder or kill, or even a written threat to do any personal injury short of killing, probably from the difficulty of distinguishing mere violence and heat of language from that settled malice, which is of the essence of most of the crimes known to the law. Where, however, threats, more or less specific, have been indulged in, sufficient to cause serious annoyance and fear of personal injury to a person of firm mind, the law provides a remedy which somewhat resembles an injunction in equity, namely, the binding over of the threatening party to keep the peace and be of good behaviour. This is further enforced by his finding sureties, and, in case the threat is carried out, the guilty party as well as his sureties are bound to pay a sum of money specified in the recognisance, which is only a species of bond or contract with the crown, binding the parties to pay a sum, if the condition of the bond be forfeited.

It will be necessary to state by whom, for what causes, in what manner, and with what results this remedy of swearing the peace, as it is called, against another, is administered.

Any threat or menace to injure the person, even though it is not followed up by any actual bodily injury, or even

by an assault, which is an imminent attempt to commit such injury, is nevertheless at common law a ground of action, provided some interruption to one's business or occupations is the immediate result.[1] And all the reason given is, that as it is an inchoate though not an absolute violence, it is in the eye of the law a trespass, for which pecuniary damages may be recovered.[2] This is, however, not the whole of the law, for, owing to the vagueness of most threats and the difficulty of reducing their harm to a definite point, actions as a means of redress are scarcely practicable, and moreover would probably often fail altogether when brought to a hearing, for a hearing could not usually be brought about till long after the heat and irritation of the moment had disappeared, and the memory of incidents had grown dull. And what most men are contented with is a smaller and feebler, though an instant remedy of a negative character, namely, what is usually called articles of the peace—a species of swearing the peace against the offender and binding him not to carry out his threat, or if it has once been acted on, not to repeat it. It is said to be called surety of the peace, because the party that was in fear is thereby the more secure and safe.[3]

What is a threat of personal violence.—In exercising this jurisdiction of enforcing sureties of the peace, a delicate duty is imposed on the justices of the peace and the courts, for the primary object of this remedy has been at last defined to be the protection of the applicant against imminent danger to the person, only in those cases where the danger is such as will seriously affect a mind of ordinary firmness. Every idle apprehension of weak and timid minds is not to be made a pretext for this proceeding, but only such circumstances as tend immediately in the judgment of reasonable persons to interfere with personal security. In this, and in many other departments, the law is obliged to adapt its remedy to the standard of the normal man, or man of average sense, judgment, and feeling. And the remedy is based entirely on the assumption that the danger apprehended is in the future, for however wickedly and violently the party complained against may have conducted himself in the

[1] Finch, L. 202; Regist. 104, 27, ass. 11.
[2] 3 Bl. Com. 120.
[3] Dalt. J. P. c. 116.

past, this alone will be no sufficient reason for thinking that he will continue to act in the same way; and yet, past conduct is generally a very safe guide as to the future, and is not to be entirely overlooked.[1] The cases, therefore, in which the law interferes to require security for the peace are such as the following. Where a threat to do bodily injury has been made to one if he go to a particular place, for example, a place he has been frequenting by way of business:[2] a threat to arrest by force a wife who has, by articles of separation, availed herself of the right to live separate:[3] a threat to burn one's dwelling, or put one in prison, or beat, or otherwise hurt one's body, or even to procure others to do the act:[4] a threat, or even a challenge or invitation to fight a duel.[5] And the same protection is extended when the threat assumes the form of injuring one's wife or child;[6] though if the threat is made to one's servant, this is deemed too remote, and it is enough for the servant in that case, to apply for the like protection to himself.[7] Again, though the threat be qualified as to time and place, as, for example, if the threatened person go to a particular house, or write to a particular female member of the family, the remedy will be granted.[8] And the taking part in a prize-fight by attending it, being an implied breach of the peace, and, indeed, all being guilty of an assault, it also justifies the justices in binding all such persons over to keep the peace.[9]

Threat to do only moderate harm.—Sometimes the party, with a view to elude this remedy against him, studiously guards his threat by expressing it moderately, as for example, thus: that he will do everything in his power to annoy the complainant "short of actual violence;" but this show of moderation will be treated as no bar to the remedy, seeing that it is impossible for an angry or spiteful man to keep within the strict line he has laid down for his own conduct.[10]

[1] Hawk. P. C. c. 60, § 6; Dalton, J. P. c. 116, p. 269. [2] R. *v* Mallinson, 16 Q. B. 367. [3] Vane's Case, 13 East, 171, n. [4] 1 Hawk. P. C. c. 60, § 6, 7; see a more severe punishment if the threat is in writing, *post*. [5] R. *v* Holloway, 2 Dowl. 525. [6] Dalt. J. P. c. 116. [7] Dalton, J. P. 116. [8] R. *v* Mallinson, 16 Q. B. 367. R. *v* Tollemache, 2 L. & M. 401. [9] R. *v* Billingham, 2 C. & P. 234 [10] R. *v* Stanhope, 12 A. & E. 620, n.

Threatening looks and conduct.—And a threat of this kind may be made by looks, tones, and gestures, as well as by express words; indeed, the one may often be more eloquent and cogent than the other, provided the justices see, that the complainant has acted reasonably in construing in the right way these inarticulate signs. Thus, where an importunate lover had been forbidden by the mother of a young lady to address the object of his affections, but, nevertheless, he followed the family to the same inn, and pushed past the mother in an eager manner towards the daughter's chamber, he was made to give this security.[1] And in another like case, where the gentleman had been rejected as a suitor over and over, but had, nevertheless, for many months been writing to the lady letters of courtship, and pursuing her from hotel to hotel, and town to town, and looking over hedges, waving his handkerchief, and making gestures to her at unexpected moments, the court held that the lady would be well entitled to this remedy, if she could swear to her belief from those acts and behaviour, that he was likely to do to her some personal violence.[2] In all such cases the court or justice must not be critical, but must give ear in a great degree to the apprehensions of the party seeking the protection, and must enter, to some extent, into his or her feelings and convictions.

Whether one who libels another can be made to give security of the peace.—It was once keenly debated, especially towards the end of last century, whether a libel was such a threat or provocation of violence and injury as to entitle the libelled person to demand security of the peace against his detractor, for it was urged that a libel at the utmost only tends to a breach of the peace, and so does not come within the ordinary province of the justice, who deals with, or ought to be confined to, acts which are imminent breaches of the peace. On this point a great judge, Pratt, C. J., once said: "I cannot find that a libeller is bound to find surety of the peace in any book whatever, nor ever was in any case except one, viz., the case of *the Seven Bishops*, where three judges said that surety of the peace was required in the case of a libel. Judge Powell,

[1] Dennis *v* Lane, 12 Mod. 132. [2] R. *v* Dunn, 12 A. & E. 599; 4 P. & D. 415.

the only honest man of the four judges, dissented, and I am bold to be of his opinion, and to say that the case is not law; but it shows the miserable condition of the state at that time. Upon the whole it is absurd to require surety of the peace or bail in case of a libeller."[1] This opinion was thought for a time to be conclusive, but in a case in 1820 which reviewed that and all the other authorities it was said, that Pratt, C. J., spoke only as to breach of privilege of parliament; and it was laid down in this last case, that as libel tends to a breach of the peace, or is in the eye of the law a constructive breach of the peace, it comes within the power of justices to arrest and commit for trial; and if so, it necessarily follows that it comes within the same jurisdiction to hold the libeller to keep the peace.[2] In that case, however, the court lost sight of the vital point, that it must always now be a question of fact, whether a libel tends to a breach of the peace, for the common sense of modern times attests that in the great majority of libels the libeller and the libelled never dream of assaulting each other, however much may be their mutual resentment on paper. The utmost length, therefore, that a court can fairly go is to hold that in some instances, according to the virulence of the libel, the libeller may be called on to give surety of the peace, but not necessarily so in all cases. The qualified manner in which such a rule as that of claiming surety of the peace in cases of libel was put by Pratt, C. J.'s instinctive

[1] R. *v* Wilkes, 2 Wils. 161.

[2] Butt *v* Conant, 1 B. & B. 548. The libel in that case was a gross one, namely, for publishing placards stating that Ellenborough, C. J., was a robber, as he had fined the libeller £1,000 and pocketed the fine, &c. The reasoning of the judges led them to prefer the alleged views of Hale to those of Coke, but time seems to be bringing the law round to the view of Coke on this point. To hold as Burroughs, J., did expressly, and as the other judges did impliedly, that a libel is *per se* "a constructive challenge to fight" is extravagant, considering the habitual self-restraint which distinguishes the present age. Though libels are constantly appearing in the warfare of the press, no one can now assume as a matter of law or fact that the libeller and libelled are thereby thirsting for each other's blood, and would inevitably fight, if they met anywhere and everywhere. Such a view either of fact or law is untenable. The fact is, that neither would touch a hair of the other's head in most cases.

sagacity, was nearer the true rule than that arrived at in the more elaborate reasonings and deductions of his successors in 1820. Indeed, in a later case in 1853, the utmost that the court would say was that in *some cases* of libel against private individuals a justice of the peace may enforce "sureties for good behaviour." But whether he could enforce "sureties for the peace" (which is a still narrower remedy), was apparently treated as doubtful.[1]

Who grants the remedy of security of the peace.—All justices of the peace are endowed with a discretion to enforce sureties of the peace from an offender as part of the general authority given by their commission. It has been said indeed, that in respect of peers and peeresses, though the same remedy is available, yet the resort must be made against them, not to justices, but to the Queen's Bench, or Chancery Division of the High Court.[2] The only reason given by the old authorities for this distinction seems to be, that the law hath "conceived such an opinion of the peaceable disposition of noblemen," that it hath been thought enough, if one of them promises upon his honour that he would not break the peace against a man.[3] But it will be difficult to carry out this distinction on any principle, and in a modern case it was deemed prudent in a nobleman, whom the justices bound over, not to dispute their jurisdiction.[4] Even though justices of the peace or one of them is usually resorted to on occasion of seeking this remedy of security of the peace, if after giving the best of their judgment to the matter they refuse to bind over the offender, the complainant may nevertheless resort to the Queen's Bench Division to demand this remedy. And this may be done either in the first instance, or by way of

[1] Haylock *v* Sparke, 1 E. & B. 471.
[2] R. *v* Marq. of Carmarthen, Fort. 359. [3] Br. Abr. Contempt: Dalt. c. 177. [4] Re Lord Gifford, 1 New Sess. C. 490.

The authorities, or rather *dicta* as to peers, are all ancient; and in one of the same class of books it is gravely laid down that "if the sheriff, in executing a capias against a nobleman, return 'that the said lord is so puissant that he cannot arrest him,' the sheriff might take the *posse comitatus* and 300 men with him to effect the arrest."—*Dalt.* c. 117. On such a point as surety of the peace, the court, as Lord Denman, C. J., observed, is not accustomed to regard ancient precedents with great respect.—Prickett *v* Gratrex, 8 Q. B. 1029.

mandamus directed to justices of the peace, if from some mistake or wilfulness they have refused or failed to exercise their discretion on the subject.[1] Moreover, where a previous application has been granted by justices, the offender may seek by certiorari to discharge the recognisances, and so practically reverse their conclusion. Yet in this last state of things the court will give great weight to the finding of the justices on any matter which they are peculiarly qualified to decide, such as whether the threats of injury were serious or jocular, or metaphorical:[2] or whether the amount of security was too high.[3] And while the Queen's Bench Division has jurisdiction to entertain in the first instance an application for sureties of the peace, yet it is now deemed the proper course, first to apply to justices of the peace, seeing that it is a subject peculiarly requiring examination in the district in which the defendant resides; and the court will in the exercise of its discretion direct the party first to apply to the justices of the locality for this kind of redress, as it is there the sureties are most likely to live.[4] Or sometimes the court will, after hearing the application, remit the matter to the local justices, at the same time specifying the amount of security to be given by the principal and his sureties.[5]

By and against whom security of the peace obtained.—The remedy of applying for sureties of the peace is open to every person without distinction of age, rank, or status—an alien, an attainted person,[6] an infant:[7] or a wife as

[1] R. v Lewis, 2 Str. 835. [2] R. v Tregarthen, 5 B. & Ad. 678; 2 N. & M. 379. [3] R. v Holloway, 2 Dowl. 525.

[4] R. v Waite, 2 Burr. 780; R. v A. B. 2 L. Ken. 511.

[5] Hutt's Case, 2 Burr. 1039; R. v Bomaster, Ibid.; 1 W. Bl. 233.

Though the exercise of this species of jurisdiction is now in practice confined to the local justices of the peace and the Queen's Bench Division, yet the Chancery Division had authority to grant a writ of supplicavit, under which the sheriff or the justices of the peace are required to arrest and take the offender, or cause him to be taken to prison, till he finds sureties; and that writ again is got rid of only by a writ of supersedeas, when sureties are given or a reason shown why they should not be required.—Fitz. N. B. 80; Vane's Case, 13 East. 172, n.; 1. Camp. Chrs. 13.

[6] 1 Hawk. P. C. c. 60, § 2. [7] Dalton, J. P. c. 117, § 271.

against her husband, if he threaten to beat or kill her.[1] It was once said that a man shall not have articles of the peace against his own wife, for "otherwise any man might get rid of a shrew." [2] But justices may very well judge of the gravity of the case as between either of the parties according to the ground stated.[3] In other respects women are subject to the remedy like men. An exception indeed may be made of lunatics, or children, who have no mind sufficient to estimate impending danger, and for whose protection there are other sufficient remedies.[4]

How the application for security of the peace is supported.—In estimating the weight to be attached to the affidavit or affirmation of the complainant, the court or justices must, as in other cases, exercise their own judgment; and though they are not bound to believe a man on his oath if vexation or malice seem to be ingredients in his application, yet it is to be remembered, that all subjects alike, the ill-conducted as well as the well-conducted, are equally entitled to the protection of the law. At the same time so serious a restraint as this on the liberty of a third person is not allowed, without the cause of complaint being verified by the complainant's oath.[5] The justices may thereupon, if satisfied that the case is sufficiently established, issue their warrant to arrest the offender, and, on his being brought before them, he may be committed to prison, until he, with or without sureties, as may be judged expedient by the justices, enter into his recognisance. But before being committed to prison the party must be first asked to find security, otherwise the commitment will be invalid.[6] Nor can justices summarily commit one for not finding sureties under an order of Quarter Sessions, there being another remedy in that situation.[7]

Articles of the peace or process for good behaviour cannot

[1] R. *v* Ferrers, 1 Burr. 635; R. *v* Bowes, 1 T. R. 696; 1 Hawk. c. 60, § 4; R. *v* Lord Vane, 13 East, 172 n. [2] Fitz. Off. 8; Dalt. c. 117. [3] R. *v* Mackenzie, 3 Burr. 1922. [4] R. *v* Mackenzie, 3 Burr. 1922. [5] R. *v* Green, 1 Str. 527; Hilton *v* Byron, 12 Mod. 243; 3 Salk. 248. [6] R. *v* Wilks, 1 Hawk. c. 28, § 9.

[7] R. *v.* Ashton, 7 Q. B. 169.

The warrant of the arresting justice may be made to bring the party before the justice "or some other justice," though it is better that the same justice should deal with the offender in both stages.—5 Rep. 59.

be granted by the Queen's Bench or Chancery Division except in open court, and if the affidavits are untrue, the court may award costs and damages against the applicant.[1]

Whether the defendant can contradict the facts on which application founded.—An application made for sureties of the peace is an *ex parte* proceeding, at least to this extent that the court or justices, on being satisfied with the affidavit, will not listen to any defence which contradicts or impugns the accuracy of the statements of the applicant. Any objection may indeed be taken to an irregularity which appears on the face of them.[2] Attempts are often made on the part of the defendant to show that the complainant has omitted material facts, or even falsely stated them, and so misled the justices or court; but this defence will not be entertained. And the Queen's Bench Division, for the same reason, will not entertain an application to discharge the recognisances taken before justices on any matter touching the merits of the case as put before the justices. Yet if the articles are on the face of them open to some defect, the Superior Court will on certiorari quash them; as, for example, where they were not granted on oath.[3] While therefore, in articles exhibited in the first instance in the Queen's Bench Division, affidavits are allowed both in corroboration and in answer to those of the complainant, an answer will only be allowed in explanation of ambiguous parts of the articles, as for example the meaning of such a phrase as "he would do her business."[4]

In some cases it may seem unjust that so serious a thing as imprisonment, or compulsory finding of sureties, should be imposed on any man at a moment's notice, and on the mere oath of another, representing that the latter stands in fear of some corporal pain at his hands, and that one's liberty can be taken away without a defence being even listened to. But the theory on which this remedy is founded is, that the matter is urgent, and so much a matter of life and death, or at least of personal safety, that no

[1] 21 Jas. I. c. 8. [2] R. v Lord Vane, 2 Str. 1202; 13 East, 171 n.; R. v Earl Ferrers, 1 Burr. 635; R. v Doherty, 13 East, 171; R. v Stanhope, 12 A. & E. 620 n. [3] R. v Mallinson, 16 Q. B. 367; R. v Dunn, 12 A. & E. 599; Lort v Hutton, 45 L. J. M. C. 95. [4] R. v Bringloe, 13 East, 174 n.

delay or cavilling about facts can be tolerated. And while this consideration should make justices of the peace and courts extremely careful not to grant this request on slight grounds, yet the responsibility is entirely thrown on the complainant, whose personal apprehensions cannot indeed be easily measured or refuted at the moment, but who may afterwards be called to answer for any wilfully false statements, on which his suspicions profess to be founded. He is liable, for example, first to the pains of perjury, and indeed where on the complainant's own statement manifest contradictions appeared, the court has ordered him then and there to be prosecuted for perjury, and has dismissed his application.[1] And where on a wife swearing articles of the peace against her husband, it appeared from other collateral motions and the defendant's affidavit, that she was insane and suffering from delusions, the application was at once dismissed.[2]

Not only is an applicant who acts falsely and maliciously liable to indictment for perjury, but he is also liable to an action for maliciously causing the arrest or maliciously causing the defendant to be bound over. And in such action the injured party need not, as in other cases of action for malicious prosecution, prove that the decision of the justices was in his favour, for a result of that kind is not in such a case possible.[3]

How long a party may be imprisoned for not giving security of the peace.—It may be asked how long a justice may consign a person to prison for not giving securities for the peace, for it is easy to see that this may be used as a means of imprisoning for life. Some of the old authorities, such as Dalton and others, expressly said, that a justice could bind a party during his life. But Hale was thought to have interpreted the statute, 34 Edward III., which authorised justices to bind malefactors to their good behaviour, as not meaning such binding to be perpetual, but only till the time of trial arrived. The point, however, having been reviewed on the authorities, the court in 1819 held that Hale was speaking only of persons charged with offences and waiting for trial; and that in other cases, where

[1] R. v Parnell, 2 Burr. 806; R. v. Mallinson, 16 Q. B. 367.
[2] R. v Mackenzie, 3 Burr. 1922. [3] Stewart v Grosnet, 7 C. B. N. S. 191.

no charge is pending, it was the inherent power of justices of the peace to bind persons for a fixed term, and the reason given was, because it saved the expense and trouble of such party attending at quarter sessions, and allowed the matter to be considered at intervals.[1] In the case of O'Connell, the defendant was ordered to enter into a recognisance with sureties, conditioned to keep the peace and be of good-behaviour "for seven years next after the acknowledgment thereof." Tindal, C. J., thought that as the defendant could *instanter* enter into the recognisance, there was no illegality in an order for such a recognisance to commence after a term of imprisonment which was itself uncertain, as being dependent on the payment of a fine. But Lord Campbell thought such a judgment was bad, as tending to perpetual imprisonment, and that a sentence should be so framed, that the defendant, after being in custody during the time for which the recognisance was given, might be restored to liberty.[2]

In cases where husbands subjected their wives to cruelty, it had been usual to bind the husband over for one year. But when Mr. Bowes, in 1787, maltreated his wife, the Countess of Strathmore, by getting armed men to carry her off to Strickland Castle, where he imprisoned her several days, till she obtained a habeas corpus, the Court of Queen's Bench then, as it was not a first offence, bound him over for fourteen years, himself in 10,000*l.* and two sureties in 5,000*l.* each. It was afterwards complained that such length of time was oppressive, for any conceivable remedy by wife against husband could be prosecuted within one year. The court, while incidentally assuming that they had no doubt of their power being unlimited and enduring so long as public justice required, yet yielded to this reasonable complaint, and consented to reduce the term to two years.[3] In a later case the court held, that a justice cannot legally commit a man, "till he find sureties," for his finding them may, owing to no fault of his, be simply impossible.[4]

It has at length been enacted by statute that one justice of the peace shall not bind over persons to keep the peace for more than twelve calendar months.[5] And though no

[1] Willes *v* Bridges, 2 B. & Ald. 278. Wilkes *v* R., Wilmot's notes, 322. [2] O'Connell *v* R., 11 Cl. & F. 407. [3] R. *v* Bowes, 1 T. R. 696. [4] Prickett *v* Gratrex, 8 Q. B. 1020; 2 New Sess. C. 429. [5] 16 & 17 Vic. c. 30, § 3.

limit has yet been put to the power of two or more justices or of the Superior Court, this indication of opinion by the legislature will no doubt be followed as a general rule by all courts in other cases. At the expiration of the time, whatever it is, justices have no power to insist on further extending it on the original complaint; at least the court wisely doubted this in 1787.[1] Any such power of indefinite imprisonment for such a cause may be easily abused, and the genius of our law is now settled against imputing to any man a general disposition to set all law at defiance, which is the real foundation of this somewhat arbitrary power, which has been so long confided to courts. As all conceivable crimes and wrongs can be prosecuted and a remedy obtained within a year or near it, there never can in any case be a sound reason for extending imprisonment on this ground beyond one year. It is also to be noticed, that though it is now in the power of courts, when a man is convicted of an indictable felony or misdemeanour under the Criminal Consolidation Acts, to order him, in addition to the ordinary punishment, to enter into recognisance and find sureties to keep the peace, yet no person can be imprisoned under that power for more than one year.[2]

Mode of arresting and binding over a party to security of the peace.—When the justices have issued their peace-warrant or warrant to arrest the party complained against, it must be addressed to and executed by the constable named therein, or it may be addressed to the sheriff, who may direct one of his sworn officers to execute it. The officer, in either case, may seize the party wherever the latter is found, and may even break into the party's or a stranger's house to apprehend him; but before doing this, the officer must first give notice of the charge to the person in occupation and request admittance. If the officer is not a sworn and known officer, he must be appointed by a precept in writing from the sheriff.[3] When the arrest is made, the officer must, without unreasonable delay, convey the party (unless indeed such party willingly accompany the officer) to the justice, who issued the warrant, or some other justice, if the warrant so specifies. It is the officer's duty

[1] R. v Bowes, 1 T. R. 696. [2] 24 & 25 Vic. c. 96, § 117; c. 97, § 73; c. 98, § 51; c. 99, § 38; c. 100, § 71. [3] Hawk. P. C. c. 60, §§ 11, 13; 2 Hawk. P. C. c. 14, §§ 2, 3.

to give facilities to the party to comply with the requirement of the law without unnecessary restraint, though he is not obliged to go up and down seeking for sureties.[1] But the officer cannot of his own accord reconvey the party to prison for refusal to find sureties, for such refusal ought to be made to the justice himself. A fresh warrant may then be issued, reciting such refusal and the reason of the imprisonment.[2]

If the party prefer, he may go voluntarily before a justice and enter into recognisances, which will have the effect of superseding any warrant that may have been issued; and it will be the duty of the justice who issued the warrant to make out a supersedeas, or to grant a liberate, if necessary, for his discharge from gaol.[3] At one time turbulent persons used to go voluntarily and bind themselves over and procure their own sureties, who on request superseded the recognisances and caused confusion, and affronted the justices of their locality. Hence by statute, in 1623, it was, by way of check, provided that such supersedeas must be moved for in open court.[4]

The usual practice is for the justice to bind over the defendant only, until the next quarter sessions, when that court may order the party to be discharged, or enter into further recognisance. And the recognisance must be certified to the next quarter sessions, there to remain of record.[5] When sureties enter into the recognisance, they bind their executors and administrators as well as themselves, so that in the event of the death of one of them the recognisance remains in full force.[6] Yet if a surety become bankrupt, or fall into poverty, the party may be called upon to enter into a new recognisance.

Effect and binding force of the recognisance.—The effect of the recognisance on the defendant and his sureties is, that they must observe the condition, and see to its being strictly complied with; otherwise the recognisance may be forfeited. To fail wilfully in appearing at the time stated;[7] to commit an act of violence or to renew a threat of

[1] Dalton, c. 118. [2] 1 Hawk. P. C. c. 60, § 12; Dalton, J. P. c. 118; 2 Hale, P. C. 112. [3] 1 Hawk. c. 60, § 14. [4] 21 Jas. I. c. 8. [5] 3 Hen. VII. c. 3; 1 Hawk. P. C. c. 60, § 18. [6] Dalton, c. 119, p. 278. [7] Lamb. J. P. 78; Crompt. 125; 3 Hen. VII. c. 3; Dalton, c. 120; 1 Hawk. c. 60, § 18.

assault to the complainant or to others;[1] or to be convicted of any offence which in itself is a breach in law,[2] will be a ground of forfeiture; though mere words of anger or of slander, such as calling one a knave or rascal, will not be so construed.

But there are many things which the party bound by recognisance may do, which are no breach of the recognisance, though they savour of violence or physical force. In order to understand what amounts to a breach, it is necessary to remember that the recognisance is substantially a covenant with the crown not to do violence to a particular person named, or do anything to the terror of the public generally. Hence it is not inconsistent with this main object, that the party may commit a trespass on another's lands; or wrongfully seize another's goods; or even steal another man's goods, provided no person is put in terror thereby. All these wrongful acts may be punished by course of law in other ways, but nevertheless are no breach, and cause no forfeiture of the particular recognisance, inasmuch as they are not necessarily connected with the special engagement it embodies. The mode of forfeiting a recognisance entered into before justices is prescribed by statute; and the result is, that the sureties and the defendant must ultimately pay the money thereby secured as a debt to the queen[3]; and it may be recollected that imprisonment for a crown debt is not yet abolished.

Getting recognisance of the peace discharged.—As the object of a recognisance is to secure a sum of money to the sovereign, should violence be done to some individual, if the sovereign or the complainant die, the recognisance becomes void, and the party, if in prison, is entitled to his discharge.[4] But the complainant has no power to release the defendant, the contract being one entered into with the sovereign alone, and as the sovereign merely represents the subjects, no pardon or release by the sovereign will amount to a discharge.[5] The recognisance used to be discharged, however, by forfeiture. It may also be discharged by having been fully obeyed during the prescribed period. Nevertheless it is the duty of the party bound to appear

[1] 1 Hawk. c. 60, §§ 20, 21. [2] 16 & 17 Vic. c. 30, § 2. [3] 3 Geo. IV. c. 46; 4 Geo. IV. c. 37; 16 & 17 Vic. c. 30. [4] 1 Hawk. P. C. c. 60, § 17; Dalton, c. 118. [5] 1 Hawk. P.C. c. 60, § 17.

at the day named, and if the complainant do not appear, and there is no charge of any breach, he is then entitled to his discharge;[1] and when a party is committed for default of finding sureties, he is not entitled to demand a copy of the examination, for the purpose of bringing an action for malicious prosecution, for that right is confined to cases where he is about to be tried for a specific offence.[2]

Surety of the peace required in some cases by statute.—For the reasons afterwards stated it is not now usual for justices to entertain an application to swear a party to his good behaviour as a substantive proceeding; nevertheless there are exceptions, where by some statute the court is authorised in substitution for, or in addition to, some other punishment, to compel the party to enter into a recognisance to be of "good behaviour." Those words are often added to the words "to keep the peace," as if they were intended to bear the same meaning. In all such cases, the statute will serve as the justification for requiring the security. Thus, where a person has been convicted of an indictable misdemeanour under the Criminal Consolidation Acts, the court may compel him to enter into recognisance "to keep the peace and be of good behaviour." In those statutes the legislature seems plainly to have viewed the words "good behaviour," as having a meaning almost identical with "keeping the peace."

In aggravated assaults on any male child under fourteen or any female, express power is given to the justices on conviction of the offender to bind him over to keep the peace and be of good behaviour for six months after the expiration of the sentence passed.[3] And even in dismissing a charge for a common assault, the justices may see sufficient ground in the evidence for binding over the defendant to keep the peace, though he was not summoned for that matter.[4] Moreover, in all misdemeanours punishable by imprisonment, the rule is laid down, that on conviction the court may order the defendant to give security to keep the peace.[5] And this is frequently added to the other punishment for a riot, a rout, an unlawful assembly, or an affray.[6]

[1] Dalt. c. 120. [2] R. *v* Herefordshire. 1 L. M. P. 323; 4 New Sess. C. 179. [3] 24 & 25 Vic. c. 100, § 43. [4] Exp. Davis, 24 L. T., N. S. 547. [5] Dunn *v* R. 12 Q. B. 1026. [6] See *post*, those heads.

How far surety for good behaviour may be ordered.—The proceeding of binding over a party to keep the peace towards some individual is an intelligible and necessary remedy or precaution, because it points to a definite and precise mischief which it is designed to avert. It is founded on the oath of an individual, that already some overt act or disposition towards personal violence has been manifested, and that if the party is not restrained or cautioned in an emphatic manner, he may do irreparable mischief. But when in somewhat similar circumstances it is thought to extend such jurisdiction into a wider sphere, and to demand "sureties for good behaviour," this involves so vague and shadowy an imputation on the party aimed at, that courts might well hesitate to act upon it. Good behaviour in the view of the law can only mean conduct flowing from a general disposition to observe its directions in their full latitude and detail; and indeed such a frame of mind ought to be frankly expected and presumed in all citizens whatever. If any person manifests a proclivity towards any specific crime, there are, or ought to be, appropriate modes of punishing not only the crime, but any attempt to commit it. All kinds of threats of violence towards the person are fully disposed of, as already described, in the application to swear the peace. To go beyond that and exact sureties for being a good citizen, without reference to any overt step towards a breach of the law, is to travel beyond the proper province of the law into the region of morals, and to seek a kind of specific performance of good conduct, which comes neither within the category of crime nor any attempt or threat to commit it. It would be time enough to interfere when something has been done sufficiently definite to disturb the general security, which the law throws round every subject of the realm.

Nevertheless, the commission of the peace, under which justices act, in terms authorised the justices to exact sureties for good behaviour as something separate from keeping the peace. It might, indeed, have been excusable for the legislature in the reign of Edward III. to expect some practical value from overawing turbulent characters by enforcing a solemn covenant with the sovereign to be of good behaviour. The primitive usages of life in an age when a police code was

vaguely conceived, when population was scanty, and crimes were only sketched out in outline, and the general sense of security was weak might have allowed of this kind of rude justice. But such a practice is scarcely consistent with modern civilisation, for no punishment or remedy is now left to the arbitrary or paternal discretion of a judge or ministerial officer, and everything which the subject is to avoid, or to be punished for not avoiding, is clearly laid out before his eyes, so that he who runs may read. When the words in the commission of the peace, and the statute of 34 Ed. III., c. 1, on which such commission is founded, are examined, it would rather appear to be the correct construction, that the words "good behaviour" were meant to be merely synonymous with security for the peace. The criminals indicated as then dangerous and of evil fame were rioters, rebels, robbers, and idle vagabonds, and these are so alluded to as to suggest violence to the person as the imminent danger to be apprehended; and all these can be kept under by swearing the peace.

In the time of Lord Coke the judges had arrived at the view, that nothing was included in "good behaviour" which was not included in "keeping the peace," and that whatever tended immediately to the breach of the peace was the test of what was provided against by swearing to good behaviour, as well as swearing the peace.[1] For where a man had been bound by surety for good behaviour, and afterwards said to his complainant "thou art a liar," "thou art a drunken knave"—these words were deemed not necessarily to import any design to break the peace, and so were held no breach of good behaviour. Nevertheless, it seems to have been the practice of justices of the peace during some centuries to interpret more or less liberally their powers of imprisoning the subject until he found sureties for good behaviour, and to extend this kind of vigilant repression to persons whose conduct did not cause any breach of the peace, though in other respects suspicious and reprehensible.[2] Dalton says that he had as justice once ordered sureties for good behaviour from a man who bought ratsbane and mixed it with corn to poison his neighbour's fowls, and "the whole bench" held

[1] 4 Inst. 181; Lamb. 115. [2] Crompt. 121, 126; Fitz. 7.

it a very good reason, and so did the judges of assize in like cases.[1] And the same authority thought this remedy was peculiarly wholesome and suitable against all who resorted to houses of evil-fame or associated with bad women. At that time, however, a constable, on seeing a man and woman go into a house of ill-fame, was entrusted with such large powers that he could "take company with him and search the house," and if found, could carry both parties to prison or before a justice to find sureties for good behaviour.[2] And common haunters of ale-houses, drunkards, gamesters, and nightwalkers could be treated in the same rough fashion, unknown in modern times.

While, therefore, there are old authorities which show, that the justices of the peace magnified very trifling irregularities into serious crimes, and went the length of exercising this delicate jurisdiction against frequenters of houses of ill fame, putative fathers of bastard children, libellers, gamesters, vagabonds, eavesdroppers, and other evil-doers, without respect, apparently, to whether their conduct caused a breach of the peace or not,[3] this extreme pressure, whether it was ever justifiable or not, cannot now safely be brought to bear, seeing the policy of the law is to discountenance everything like vague accusation and suspicion as a ground for interfering with the liberty of any man.[4] And though so late as the time of Hawkins (in 1716), after some misgivings about the extent

1 Dalt. c. 124. 2 Ibid. 3 Lamb. 115; Pulton, 18; Dalton, c. 123; 1 Hawk. c. 61.

4 A respectable justice of the peace of the early part of James I. thus discourses complacently on his power of repressing misbehaviour, and advises his brother justices how to act: "You may see admitted by the court (13 Hen. VII.) that if a man in the night season haunt a house that is suspected for bawdry, or use suspicious company, then may the constable arrest him to find surety for his good abearing; for bawdry is not merely a spiritual offence, but mixed and sounding somewhat against the peace of the land. And therefore it shall not be amiss at this day, in my slender opinion, to grant surety of the good abearing against him that is suspected to have begotten a bastard child, to the end that he may be forthcoming when it shall be born; for otherwise there will be no putative father found, when the justices shall, after the birth, come to take order for his punishment."—*Lambard*, 119. This last crucial difficulty as to putative fathers has been got over tolerably well, but in a different way.—See *post*, ch. ix.

of the justices' powers, he went the length of saying that he was inclined to think that a justice had a discretionary power to take surety for good behaviour of all those whom he had just cause to suspect to be "dangerous, quarrelsome, or scandalous," it is equally clear in the present day, that if such a doctrine ever was correct, it has long ceased to be so, and the less this ancient process is resorted to in any case whatever, the better, seeing that there is abundance of regular remedies available on all hands for all the pressing evils that can arise, and remedies too, in course of which both sides can be heard fairly out.

Another reason why this jurisdiction should no longer be exercised is, that when such a recognisance is taken, it is difficult to define what would be a breach of it, and this increases that uncertainty which is justly odious to the law. All the laws must be equally obeyed by a good citizen, and any one breach must be a misbehaviour. Yet it would be impossible to hold that each deviation from the duties of a good citizen was to be visited by double punishment, namely, the forfeiture of the recognisance and the penalty assigned by another procedure to the commission of the illegal act. Justices and offenders would be equally harassed by waging this incessant warfare with an uncertain enemy.

If security for good behaviour can be enforced against libellers.—Much discussion arose towards the end of the last century (as it did also in the matter of surety of the peace) as to the power of courts to enforce sureties for good behaviour against those who publish libels, it being argued that this savoured of tyranny, and was against the liberty of the press. But in 1808, when the question was raised and argued, it was said that the House of Lords had consulted the judges, who unanimously gave their opinion that on judgment for a misdemeanour the court might adjudge the defendant to give security for his good behaviour for a reasonable time.[1] In proceedings before judgment there is more doubt. Pratt, C. J., declared that it was unlawful for justices to require sureties for good behaviour from libellers, but this was probably founded on the other part of the case then in question, namely, that

[1] R. *v* Hart, 30 St. Tr. 1131, 1344; 47 Lords J. 271; Dunn *v* R., 12 Q. B. 1041.

a secretary of state was not in the position of a justice of the peace.[1] Yet it has been since said that in some cases of libel against private individuals, justices of the peace may bind the party to his good behaviour, though no charge of crime is made.[2] On this subject the remarks already made about articles of the peace against libellers equally apply.[3]

Surety for good behaviour ordered by statute.—Owing to the wide and liberal ideas of courts and legislatures on this subject, and the practice already mentioned, various statutes, chiefly of ancient date once did, and so far as they are unrepealed still do, authorise the court on a conviction for certain offences to require, in addition to the other punishment, that the offender shall enter into security for his good behaviour for a time subsequent.[4] Such are the Criminal Consolidation Statutes already mentioned.[5]

Certain written threats punished more severely.—Not only are threats of violence to the person subject to the kind of redress already mentioned, namely, security of the peace, but there are also threats of another kind, sometimes equally violent and imminent, and sometimes rather suggesting moral than physical pressure, which the law has singled out for a heavier punishment. These are threats made in writing to do special kinds of injury, and which no man can receive with entire equanimity, for the circumstance of their being put in writing denotes a deliberation and malignity, which mere verbal and hastily-uttered threats seldom suggest. All such written threats, though not amounting to any actual injury, tend to cause such perturbation of mind with regard to the future, and as to the next step that may be taken by the enemy, and are so incompatible with that liberty which is essential to the pursuit of every kind of business, or even to the enjoyment of life, that the law has thought fit to punish them severely. These may be here shortly noticed.

Letter threatening to murder, burn one's house, &c.—By express enactment, whosoever maliciously sends or delivers a letter or writing threatening to kill or murder a person,

[1] R. v Wilkes, 1 B. & B. 548; R. v Shuckburgh, 1 Wils. 29.

[2] Haylock v Sparke, 1 E. & E. 471. [3] See *ante*, p. 192.

[4] It is the same for keeping a disorderly house, 25 Geo. II. c. 36, § 6. [5] *Ante*, p. 202.

is guilty of felony.[1] And for a like reason to threaten by letter or writing to burn or destroy one's house, buildings, or corn, or ship, or wound one's cattle, is punishable in the same way.[2]

Whether the judge or the jury construe the written threat.—When the judges were consulted by the House of Lords on Fox's bill being introduced, they gave their opinion, that it was for the judge and not for the jury to say what was the meaning of a threatening letter.[3] But the passing of Fox's Act abrogated the old rule, if it ever existed, in the case of libel, and thereby enhanced greatly the power of juries, as will be afterwards seen. The rule that the jury may construe a written threat, and say what it meant, has accordingly long been adopted. Thus it was held to be unnecessary, in order to constitute the offence of threatening to burn, that the words " burn or destroy " be actually used, if the jury hold that the language is equivalent.[4] And though the general rule is still, for the judge alone to construe a written document, and say what it means, such rule is departed from in a case of this kind. And as the sending of such a letter is often contrived with secrecy, the statute assigns the same punishment to whoever shall " directly or indirectly send, or cause such letter to be received, knowing the contents thereof;" and thus whether the threat is sent to the person threatened, or whatever be the means by which it reaches him, or even whether it reaches him or not, if once sent upon its errand, are matters now wholly immaterial. If a letter be put in such a place that it is likely to be handed by a servant or other person to the person intended to be threatened, that is sufficient.[5] And the fact of other letters of a threatening kind having been sent before or afterwards, or any declaration afterwards having been made to that effect, is admissible to show the intent or explain the meaning.[6]

Letter demanding money without cause.—Not only is a

[1] 24 & 25 Vic. c. 100, § 16. The punishment is penal servitude for five to ten years, or imprisonment for two years.—27 & 28 Vic. c. 47. [2] 24 & 25 Vic. c. 97, § 50. [3] 29 Parl. Hist. 1369. [4] R. v Girdwood, 2 East, P. C. 1121; 1 Leach, 142; R. v Tyler, 1 Moody, C. C. 428; R. v Boucher, 4 C. & P. 563; R. v Tucker, 1 Mood. C. C. 134. [5] R. v Wagstaff, R. & R. C. C. 398; 2 East, P. C. 1115, 1120, 1122. [6] 2 Leach, 749; R. v Tucker. 1 Mood. C. C. 134.

written threat to murder another or to destroy his property a felony, but it is also felony to send or cause to be sent a letter demanding with menaces and without any reasonable or probable cause any money or valuable thing.[1] And this is not the less a threat, that the party may be indicted for larceny.[2] Yet the demand must be made in such terms as to unsettle a firm mind,[3] and must involve value.[4] Even to imprison on a fictitious cause is a threat in this sense.[5] Such a mode of demanding a debt which is due is not unfrequently resorted to; but if there is a real debt, the severe punishment already described is inapplicable, however threatening be the language a real creditor sometimes uses. In his case, there being a cause of debt, the law does not interfere by stigmatising his demand of it as a crime; and though using threats may be a good reason for applying for security of the peace, debtors seldom think fit to resort even to that remedy.[6]

Letter threatening to accuse in order to extort money.—A still more odious crime, liable to the same punishment, is that of sending a letter accusing or threatening to accuse any other person of any of the more serious offences, or of rape, or the infamous crime, with intent thereby to extort or gain money or a valuable thing.[7] And indeed it is not merely the putting into writing of a threat to accuse of an infamous crime that is punishable, for even verbally

[1] 24 & 25 Vic. c. 96, § 44; 27 & 28 Vic. c. 47. The words are "any property, chattel, money, valuable security, or other valuable thing." The punishment is penal servitude for life, or not less than five years, or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and if a male under sixteen, with or without whipping.

[2] R. *v* Robertson, 1 L. & C. 483. [3] R. *v* Walton, 1 L. & C. 288.

[4] R. *v* Hamilton, 1 C. & K. 212. [5] R *v* Robertson, 1 L. & C. 482.

[6] When a Roman noble was importuned to pay his debts, it is said that some trusty sycophant was often procured to prefer a charge of poison or magic against the insolent creditor, who was seldom released from prison till he had signed a discharge of the whole debt.—*Gibbon*, *Rom. Emp.* ch. xxxi.

[7] 24 & 25 Vic. c. 96, § 46; 27 & 28 Vic. c. 47. The crimes threatened are "any crimes punishable with death, or seven years' penal servitude; or an assault with intent to commit rape, or an attempt or endeavour to commit rape, or any infamous crime, as buggery, or any assault with intent to commit buggery, or any attempt to do so, or any threat or persuasion to induce one to do so."

accusing any one of such crime with a view to extortion will subject the accuser to the same punishment.[1] This demand of money, coupled with a threat, for both must concur, must be sufficiently distinct that a jury can clearly construe the writing to that effect.[2] And a threat includes a statement that evil will befall if the money asked is not given; moreover it is always a question to be decided with reference to minds of ordinary firmness, as distinguished from a state of health causing any exceptional sensitiveness on the part of the threatened person.[3] And whether the party accused really committed the alleged crime is altogether immaterial if the intention was to extort money, though the truth of the charge might in that case show that the thing aimed at was rather compounding felony than this particular crime.[4] And if the threat be to publish a libel, it is immaterial whether it is really libellous,[5] or whether the court of accusation is a real court,[6] or whether the threat was aimed at the prosecutor's son rather than himself.[7]

It is indeed an indictable offence at common law for two or more to conspire to defame and disgrace one, if the intent is to extort money;[8] and it is the same to indict for any offence for the purpose of extorting money.[9] But a mere threat to sue for penalties is not deemed serious enough to disturb a firm mind.[10] And for a like reason, whoever, with intent to defraud or injure another, shall by violence, or threat of violence, or of accusation of crime, induce or compel one to execute or destroy a deed, or valuable security, commits a felony, and is punishable in the same manner.[11] And a similar offence to the foregoing is that which consists in threatening to "publish something" in order to extort money.[12] All these things disturb one's peace of mind, and interfere with one's occupations, whatever they be. Hence it is, that in all the preceding cases of

[1] 24 & 25 Vic. c. 96, § 47. [2] R. v Menage, 3 F. & F. 310. [3] R. v Smith, 19 L. J., M. C. 80; R. v Robinson, 2 East, P. C. 1110; 2 Leach, 749. [4] R. v Richards, 11 Cox, C. C. 43; R. v Cracknall, 10 Cox, C. C. 408. [5] R. v Redman, 10 Cox, C. C. 159. [6] R v Robinson, 2 M. & Rob. 14. [7] R. v Redman, L. R. 1, C. C. R. 12. [8] 1 Lev. 62; 1 Sid. 68; 1 Keb. 203, 254. [9] R. v Hollingberry, 4 B. & C. 328. [10] R. v Foutherton, 6 East, 126. [11] 24 & 25 Vic. c. 96, § 48. [12] 6 & 7 Vic. c. 96, § 3.

threats in writing it is wholly immaterial, whether the menaces or threats be of violence, injury, or accusation made or caused by the offender or any other person he employs.[1]

Challenge to fight, how treated.—We come now to a species of provocation to break the peace which is perhaps the most unmistakable of all that have yet been mentioned, and it involves such a renunciation of all law, such a defiance of all order, and of that moderation and self-restraint which characterise a peaceful citizen, that it is difficult to comprehend with what complacency it has been deemed during so many centuries a venial, if not a laudatory step. As it will be necessary at a later stage, and under the head of murder by duelling, to notice this subject more particularly, it will be enough here to say that a challenge to fight a duel seems of all others one that pre-eminently calls for some instantaneous remedy, and a swifter punishment than any of the preceding. A challenge to fight betokened a bloodthirsty and uncontrollable passion and malignity which too long attracted a morbid and misplaced sympathy during the course of many centuries. Such challenge was indeed often sent as a pretext for burning, pillaging, and ravaging the property of the opponent if he refused it, and the Golden Bull of the Emperor Charles IV. forbade challenges on that very account.[2] Our law was, in theory, most decisive. A challenge to fight, being in its view a provocation to a breach of the peace, is a misdemeanour at common law, and punishable by fine and imprisonment, and also by compelling surety of the peace for a time to come.[3] And though circumstances of provocation may mitigate the punishment, yet these can form no justification or defence.[4]

Challenge to fight may be verbal or written.—A challenge is not indeed to be inferred from mere abuse and strong language, yet if the words used involve indirectly an

[1] 24 & 25 Vic. c. 96, § 49. [2] 11 Univ. Mod. Hist. 377. [3] R. v Rice, 3 East, 581; Comb. 10.

Formerly a public recantation of the act was, or might be made, a part of the punishment, or, as Hobart called it, the defendant was sentenced to "wear papers."—R. v Darcy, 1 Sid. 186; Moor, 563; Hob. 215.

[4] 1 Hale, P. C. 452; R. v Taverner, 1 Ro. Rep. 360.

invitation to fight, instead of resorting to a court of law to settle disputes, it is of no consequence whether the words are spoken or written, or whether the invitation is conveyed by circulating papers or libellous prints.[1] And indeed where a letter containing a challenge has once been posted, the offence is committed whether the letter reach the party intended to be challenged or not.[2] It is, however, obvious that angry words, though tending to provoke anger, are not to be lightly construed into a challenge to fight, as, for example, merely calling a man a liar.[3] It is also to be borne in mind that language which fifty years ago may have been properly construed to amount to a challenge, or an attempt to induce a challenge, may, according to modern ideas, no longer reasonably bear such a construction, for the standard of morality and propriety varies from time to time on this and other subjects. The phrase, "seeking the satisfaction usual among gentlemen," would now be interpreted differently from what was usual in former times, for people have now outgrown the ferocious instinct to fight over every dispute, and learnt to moderate their rage till a court of law shall solve the difficulty.

Attempt to provoke a challenge is a crime.—A mere attempt to provoke a challenge is equally indictable with a direct challenge or invitation, nor is it any defence that the attempt did not succeed, or that the intent was not directly apparent, for the law often infers a guilty intent from the fact of provoking a third party.[4] And where the defendant wrote, "You behaved like a blackguard, and I expect to hear from you, and will attend to any appointment you think fit to make," the court held this indictable, for it was merely playing on a different passion, while the purpose in view was unmistakable. In the case, however, last mentioned, Lord Ellenborough thought it might in some circumstances be justifiable to send an ostensible incitement to a challenge, in order to develop and detect the real disposition of a suspected enemy, who harbours latent purposes of a malicious and dangerous kind, and so as to support an application for security of the peace.[5]

[1] Lord Darcy *v* Markham, Hob. 120; R. *v* Hicks, Id. 215; R. *v* Langley, 2 L. Raym. 1029, 2 Salk. 697. [2] R. *v* Williams, 2 Camp. 506. [3] R. *v* Langley, 2 L. Raym. 1031. [4] R. *v* Phillips, 6 East, 464. [5] R. *v* Phillips, 6 East, 475.

But that explanation ought at least to be set up expressly as a defence, with the reasons for so acting.

Criminal information sometimes granted for a challenge.—An indictment is the ordinary remedy for a challenge or an attempt to procure a challenge to fight, and the Queen's Bench Division is slow to grant a criminal information, especially where the applicant has himself been originally in fault, or there is any defect in the materials on which the charge is founded.[1] Such a special remedy indeed is now seldom applied for except where some grave public importance is involved in the dispute.[2]

Usual punishment for a challenge to fight.—The punishment for the misdemeanour of sending a challenge to fight is entirely in the discretion of the court, but it is usually severe, owing to the highly turbulent disposition displayed. In a case in 1803, where a lieutenant in the navy challenged his superior officer, the defendant was fined £100, was imprisoned for one month in addition to his previous imprisonment, and ordered to give surety to keep the peace for three years, himself in £1000 and two sureties each in £500.[3] And the Star Chamber once fined a person £10,000 for sending a challenge, Laud saying that the practice was against the law of all nations.[4]

Intimidation and molestation in business.—There is another form of interfering with the security of persons without actual violence, which, though it consists chiefly of the apprehension of a more remote evil rather than any pain or suffering imminent to the body, remains to be noticed. This is the intimidating of others in such a way as to compel them to alter their conduct, to abandon certain employments, or join in certain associations which otherwise they are not inclined to do. This violation of law seems to have been familiar to the legislature for centuries, but has arisen more prominently of late out of the complicated interests which the dissensions between labour and capital have from time to time occasioned.

[1] R. v Hankey, 1 Burr. 316; R. v Younghusband, 4 Nev. & Man. 850; R. v Larrieu, 7 A. & E. 277.

[2] In applying for a criminal information, the threatening letters, or at least verified copies, should be produced.—R. v Chappell, 1 Burr. 402. As to duelling, see "Homicide."

[3] R. v Rice, 3 East, 581.

[4] Burn, Star Ch. 133.

Principles of common law as to interfering with another's work.—The principle of the common law is said to be that every man is entitled to attend to his own business in his own way, without any further interference from others than arises from a like right on their part to do the same; and this indeed is an axiom which, according to our experience, all laws must assume as a starting point. The ancients, it is true, had most of their manual labour done by slaves, but the dignity of modern freedom draws after it other conditions. Difficulty may exist in defining how near the pursuit of one man's interests must come to thwart those of another before the law can take notice of it. But this much is self-evident, that if A, not by accident, but purposely, puts himself in the way of B in order to prevent B going about his own business in his own way, this will *primâ facie* be, and ought to be, a cause for some kind of interference on the part of the law. Whether the obstruction is physical, such as an actual assault or imprisonment, or whether it is moral, such as a threat to do some harm unless B acts otherwise than he is inclined to, ought not to make any real difference, for the terror which disables the mind and unfits it for the business of life may be the result of some mental calculation as well as of imminent physical pain. It has been seen that where A is likely to repeat an assault or threatens to injure B, there is open to B the remedy of exhibiting articles of the peace against A; and that, altogether irrespective of what B was then doing or intending to do. And though the intimidation, against which sureties of the peace have been required and granted, savours of physical force, yet it is difficult in point of principle to draw the line between that and a kind of intimidation which, though somewhat less cogent, somewhat more remote and circuitous, is nevertheless equally effective within a certain range even on minds of ordinary firmness. Cases of this last kind have become conspicuous within the last half century, where workmen who are members of trade unions concuss other workmen to become members of the same union, or members to conform to the general wish, the motive being to compel these so to act that the power of such unions by force of numbers and unanimity may be irresistible.

Ancient law as to freedom of trade.—That delicate sense

of freedom and that sensitive abhorrence of dictation and pressure of all kinds which is felt in modern times was not to be expected in earlier ages and rude communities, for the more we recede from civilisation to barbarism, the more does the spirit of domineering, violence, and recklessness of others' interests and feelings appear to prevail in all relations of life and all relations of business. A delicate and habitual regard for the rights, interests, and feelings of others is the fruit of civilisation alone. Yet a glimmering of the first principle, that trade is free, and that all restraints on trade are odious, seems long to have been traceable, as is seen in the early cases about engrossing, and enhancing the price of, victuals.[1] And the clause in Magna Charta securing to each his liberties was understood by Coke to imply this as a common law right or liberty, for he says every subject "hath freedom to put his clothes to be dressed by whom he will."[2] It was thus deemed to be a common law principle that trade must not be restrained, and the rule as to monopolies was said to be one of the natural developments of that principle. Nevertheless, the long series of statutes, beginning in the time of Edward III., called the Statutes of Labourers, which had for a main object to fix wages and prices, and even punished those who engaged for other wages and prices, was in direct conflict with that principle, though our early legislators obviously did not comprehend its true bearings, or see it in that light. Thus it was that the courts and the legislature became possessed with two irreconcilable principles, freedom of trade on the one hand, and the restriction on trade caused by fixed wages on the other hand; and between these extremes their minds must have always vibrated and become confused. Hence the early, and even not a few of comparatively recent decisions on these subjects are not entitled to the veneration commonly paid to the judgments of the courts on things firmly grasped and better understood. And in estimating the force and effect of their decisions, the existence of these two irreconcilable doctrines must always be borne in mind.

In these circumstances it was not to be wondered at that so late as the year 1800 it was deemed still an indictable

[1] 3 Inst. c. 89. [2] 1 Inst. 47.

offence at common law for a hop merchant to buy up most of the hops in the market in order to enhance the price, and he was fined 1,000*l.*, and imprisoned for four months.[1] All punishments for engrossment were however repealed in 1844,[2] but conspiracies to vary the market by false rumours were left as before, and there are other forms of encroachment on trade still existing and still to be apprehended, for liberty of trade or contract is nothing else than the natural right of each man to turn his faculties and his opportunities to the best account, subject to the least possible interference from all other fellow subjects. As Coke remarked, every man's trade maintains his life, and to dispossess him of one is to dispossess him of the other.[3] Again it was also held, that a man's personal freedom is so inseparable from his life that he can neither part with it, nor bargain it away, nor transfer it to the keeping of third parties; and all agreements to such an effect are illegal and void both in the transferor and the transferee.[4] And in like manner it has been held that a person's labour is so essentially his own, and inseparable from his person, that he can neither sell it, nor transfer it, nor by any covenant or agreement extinguish or suspend it, except for such limited time as is involved, for example, in the usual agreement to serve a master.[5] This is founded on the inviolability of the person in matters of business, or, as it is called, on the reason against restraint of trade.

Trade unions interfering with work.—It seems only a development of the same principles to say that a workman cannot by any valid agreement divest himself of the liberty to employ himself on any terms he thinks reasonable, and that any attempt of third parties, whether founded on contract or not, to dictate to him, irrespective of his own will, when he shall cease to work, is illegal. It is illegal in him as well as in those who bargain with him to such an effect, and neither can enforce such a contract against the other. In other words, any trade

[1] R. *v* Waddington, 1 East, 143. [2] 7 & 8 Vic. c. 24. [3] Case of Monopolies, 11 Rep. 87a.

[4] Re Somersett's case, 20 St. Tr. 49. This point belongs to the head of law, to be afterwards treated, entitled, "Security of Contract." [5] Hilton *v* Eckersley, 6 E. & B. 47.

union assuming power to dictate to a workman, whether a member or not, when he shall leave a service, does an act which the workman may with impunity resist and disregard. And this view of the law has been confirmed by a very recent statute, to be mentioned. And for like reasons, a combination of masters to discharge servants at the dictation of third parties, in order to keep wages low, was held, if not an indictable offence at common law, as at least contrary to the freedom of trade, and as so far void, that it could not in any way be enforced.[1]

Action for decoying another's servant.—It is indeed at common law an actionable wrong to induce or procure a workman to break his contract, if the breaking causes damage to the master. Hence if I, by offering higher wages, or otherwise, cause him to leave, so that his master suffers loss, his master can sue me for such loss, and recover damages, the two elements of liability against me consisting in my knowing that the workman was at the time under contract to another master, and that the breach of such contract which I procured would cause his then master some loss.[2] But on the other hand, if I without any active inducement, by offering larger wages, cause another's servant to leave his master, and such servant chooses to accept my terms and break his contract with his former master, that is to say, if I have left it entirely to the servant's election, I incur no liability and do no wrong; the servant in that event alone incurs liability for the breach of his contract with the former master, in which case, if he pay proportionable damages, he will be quit of his liability. At the most he must pay those damages due to the former master for the breach of contract, and when those are paid we are both free to do as we please.[3] Such a remedy, namely, the recovery of damages for any loss suffered, seems adequately to meet the occasion. And it has been held, that though I actively procure a workman to break his contract, I commit no indictable offence at common law, and that no one can be indicted

[1] Hilton v Eckersley, 6 E. & B. 47. [2] Lumley v Gye, 2 E. & B. 216; Blake v Lanyon, 6 T. R. 221; Fawcett v Beavres, 2 Lev. 63.
[3] Bird v Randall, 3 Burr. 1345; 1 W. Bl. 387. See comments on that case in Godsall v Boldero, 9 East, 72.

for being a common procurer of servants to break their contracts, an action of damages being at most the only remedy.[1] It seems to follow from the same principle, that if a trade union induced a workman to break his contract and leave his master, this would be no indictable offence at common law; but at most those who so advised the workman would be liable for damages in an action by the master.

Old statutes as to servants leaving their service.—The Statute of Labourers of Elizabeth in 1562, while repealing the older statutes beginning with Edward III., and consolidating and re-enacting their better parts, made it compulsory on workmen to serve for not less than a year, and fixed their wages and hours of work, and punished absenting workmen with fine and imprisonment, and punished masters paying more than legal wages with fine and a shorter imprisonment. So that the most rigorous relations between master and workmen were thereby riveted on both—relations at which modern experience and enlightenment revolt.[2] That class of statutes made it a penal offence for a workman to break his contract and leave the service: and hence it was held that if several combined to commit a penal offence, this was a conspiracy, and indictable as much as if the breach were itself indictable.[3] But it cannot with safety be laid down that an agreement or combination to commit a mere actionable wrong against A would be indictable at common law, though some dicta, and even one or two decisions, apparently go to that extent.[4] Much confusion has no doubt existed on this subject, which has been chiefly caused by the doctrine of freedom of trade being erroneously mixed up with the question of breaking an isolated contract, and sometimes it has been doubted whether, though it may not be an indictable offence to induce one servant to desert his master, it may not be so to induce a strike of workmen, in other words, a large body of workmen to desert simultaneously with the in-

[1] R. v Daniel, 6 Mod. 182; R. v Collingwood, 2 L. Raym. 116.
[2] 25 Edw. III. St. 1; 5 Eliz. c. 4; repealed in 1875 by 38 & 39 Vic. c. 86, § 17. [3] R. v Thompson, 16 Q. B. 832. [4] See comments on authorities, Wright's Criminal Conspiracies, 40–43.

tention to cause loss to the master who employed them.[1] And if it be said to be contrary to justice that a master should suddenly be subject to wholesale desertion, the abandonment of his business, and irreparable loss of profit on large contracts, for the successful carrying out of which steady and continuous labour is essential, it may be answered that the only appropriate remedy lies in his own hands, namely, that he should guard in all his contracts against any responsibility or loss arising from strikes among his own men in the same way as he guards against the hurricane and the pestilence, or any act of God which he cannot control.

Series of statutes as to combinations of workmen.—Another class of statutes were passed for the express purpose of making combinations for certain defined objects connected with trade indictable offences. These were the combination statutes, beginning with the Statute of Conspirators of 33 Edward I., and including statutes of Henry VI. and Edward VI., down to George III. The statute of Edward VI. shows that workmen were then in the habit of making confederacies and agreements as to the hours they should work, and what work they should do in a day, and what prices they should work for, and those that so conspired were declared liable to fine and imprisonment, and on a third offence to be set in the pillory, and to lose one ear, and be declared infamous.[2] And in 1725 the offence of threatening masters or others for not complying with their rules and demands was declared felony.[3] In 1825 the old statutes were repealed, and while workmen and masters were severally allowed to meet, confer, agree, and settle as to wages, hours, and prices, all persons were declared liable to imprisonment for three months if by violence, threats, intimidation, or molestation they forced or endeavoured to force a workman to depart from his hiring, to refuse work, to become a member of a club, or to comply with rules made as to wages; and the same if they forced a master to alter his trade or business, or to limit his workmen and servants.[4] In 1871, and again in 1875, that

[1] *Per Crompton*, J., Hilton *v* Eckersley, 6 E. & B. 47; Erle, on Trade Unions, 36. [2] 2 & 3 Ed. VI. c. 15. [3] 12 Geo. I. c. 34. [4] 6 Geo. IV. c. 129.

prior statute was repealed, and such offences were defined in different language.

Under the various combination statutes there was nevertheless nothing illegal in workmen carrying out a strike, so long as those who struck did not break their contract, but gave regular notice to leave the work, and so long as they abstained from the violence, threats, intimidation, and molestation described by that class of statutes.[1] There were, however, many loose expressions pervading the decisions of the courts, which were naturally due to the great multiplicity of the statutes and the uncertainty as to their precise objects, as well as to the ignorance of those laws since made plain by political economists. And until very recent times it was doubted whether, irrespective of any breach of contract, and of any threat or molestation, the mere fact of several workmen combining simultaneously to leave the service, though each could do so with impunity, was not an indictable offence. All this confusion was sought to be put to an end in 1871 and 1875, when the last revisions of these acts took place.[2]

Trade union not illegal in itself.—It is now declared by statute that there is nothing illegal in the purposes of any trade union, so as to avoid any agreement or trust by reason merely that it is in restraint of trade.[3] At the same time a trade union still cannot enforce any agreement, with or between its members as to the terms on which each will accept employment, or the payment of his subscriptions or fines, or as to allowances made for acting in conformity with the society's rules.[4]

Modern definition of intimidation in another's business.—The law of intimidation connected with trade disputes was after much discussion at last declared by the legislature. The Conspiracy and Protection to Property Act of 1875 enacted that whosoever should be guilty of the following

[1] R. v Selsby, 5 Cox, C. C., 495, n.; R. v Shepperd, 11 Cox, C. C. 325. It was held, however, also that to strike in breach of their contract, that is to say, to combine to commit a penal offence, was a molestation within the statutes.—R. v Rowlands, 5 Cox, C. C. 404; 2 Den. 361.

[2] 38 & 39 Vic. c. 86; 34 & 35 Vic. c. 31; 39 & 40 Vic. c. 22.

[3] 34 & 35 Vic. c 31, § 3. [4] 34 & 35 Vic. c. 31, § 4.

conduct, with a view to compel any other person to abstain from doing or to do any lawful act, in other words, from pursuing any lawful business, should be punishable. This conduct is described as wrongfully and without legal authority, (1) using violence to or intimidating any other person, or his wife, or children, or injuring his property; or (2) persistently following any other person about from place to place; (3) hiding any tools, clothes, or other property owned or used by any other person, or depriving him of or hindering him in the use thereof; (4) watching or besetting the house or other place where any other person resides or works, or carries on business or happens to be, or the approach to such house or place; or (5) following any other person with two or more other persons in a disorderly manner in or through any street or road.[1] But in order not to interfere with the legitimate objects of associations of men, who are careful, while seeking occasion to reason and expostulate with others, not to go the length of intimidation, it is provided that the attending at or near the house or place where a person resides or works, or carries on business or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section. By this qualification fair play is given to all kinds of argument and discussion.[2] The same enactment, though its chief moving cause was the difficulty of protecting workman against workman, is stated in sufficiently general language to include all persons whatsoever, and is no longer a piece of class legislation. Whenever a person, whether workman or not, who has a legal right to do or abstain from doing any act is wrongfully, and without legal authority, and with a view to compel him to act against his will, persistently followed, watched, or beset, or if his wife or children are intimidated

[1] 38 & 39 Vic. c. 86, § 7. "The Conspiracy and Protection of Property Act, 1875."

[2] The word "intimidation" was said by the judges in O'Connell's case not to be a word of art, and not necessarily to import a bad sense.—O'Connell *v* R., 11 Cl. & F. 407. But time has since changed that sense, and this statute has now made the word a word of art, and used it in a bad sense.—*Ibid.*

or mobbed in the street, a criminal, or at least a penal, offence is committed.[1]

The punishment for these offences of intimidation and besetting is somewhat peculiar. There are two remedies provided. One is a summary proceeding before one or more justices of the peace; but such justices cannot impose a higher penalty than twenty pounds, nor impose a longer imprisonment than three months; and yet it is discretionary in them to punish the offender in either of these two ways. At the same time the offender, when accused and brought before the justice, has a right to declare that he objects to be tried by such court, and in that event the offence must be treated as an indictable offence, and he can only be committed for trial before a jury in the ordinary way. If he is tried and convicted before a justice, he may appeal to quarter sessions, but there is no appeal against a conviction if such conviction is upon an indictment.[2]

Fair argument by trade unions is legal.—The recent statutes, modifying the common law relating to interference with the liberty of others in matters of trade and business, have singled out those acts which most frequently occur to disturb the natural right of each to settle for himself the kind of work and the kind of master, as well as the terms of employment, which he will accept. These statutes punish, in a more summary way than the common law did, the commission of acts savouring of intimidation and moral pressure sufficient to operate on a reasonable mind, and yet care is taken to leave untouched the right of free discussion and expostulation between man and man on all points relating to their common interest. The essence of the whole, in short, is, that any trade union may now use all means of fair argument, discussion, expostulation, and comparing of notes with every person it can reach; and, indeed, without this free interchange of thoughts and views, the liberty of the subject would be seriously endangered; and the natural right of workmen to join their forces and further their common interest would be impracticable.

Now legal for many workmen simultaneously to leave their work.—Moreover, the common law doctrine (if it ever

[1] 38 & 39 Vic. c. 86, § 7. [2] 38 & 39 Vic. c. 86, §§ 7, 9, 12, 13; 11 & 12 Vic. c. 43, § 12.

existed in so general a form), that an agreement of two or more to do what each could do individually without being indictable, has been abrogated by the same statute to this extent, that that doctrine no longer applies to acts relating to trade disputes. The statute enacts that an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy, if such act committed by one person would not be punishable as a crime.[1] It was justly thought an anomaly that an act which one could do with impunity, or, at least, which was at most only actionable when so done by him, should become indictable merely from the accident that two or more joined in doing the same thing at the same time. That anomaly, if it ever in reality existed, has now been removed to the extent already mentioned, namely, in relation to a trade dispute, this last being the subject-matter that most usually gives rise to the offence and the difficulty. But where two or more agree to do an actionable wrong in relation to other matters than trade disputes, the common law, as above stated, remains unaffected on that point. The statute accordingly seems to make lawful, or at least to exempt from any punishment, the act of two or more persons, who, for the purpose of raising wages, simultaneously stop work at one time, and under circumstances, however injurious to the master. One or two exceptions, however exist to this unlimited right to strike. It is provided that when the work is the supply of gas or water to a town or district, and the breach of contract will endanger human life, or cause serious bodily injury, or expose valuable property to destruction or to serious injury, then the right to strike shall not be protected under this act to the extent thus described.[2]

These exceptions to the general freedom of influencing wages, like other matters, through the medium of a sudden breach of contract, have been introduced for the protection of the public, who, if not so protected, might in the cases

[1] 38 & 39 Vic. c. 86, § 3. A crime means an offence either indictable or punishable in a summary manner, so as to subject the offender to imprisonment absolutely or as an alternative for some other punishment.

[2] 38 & 39 Vic. c. 86, §§ 4, 5.

excepted be incommoded to an incalculable extent. While the contending interests are striving to produce some change in each other's resolution and stand at bay, and the product of their joint capital and labour no longer flows out for the general advantage, it would only be inflicting wanton mischief on innocent third parties if a limit were not put to the general right in these excepted and urgent cases last mentioned.

Tumultuous assemblies.—Having now treated of various forms of apprehended injuries and threats, which proceed from one individual towards another, there are still some apprehended injuries of the same class which equally strike terror into the individual, but yet do not proceed directly and intentionally from one to another. They proceed rather from a multitude of persons, who profess to be engaged in some common purpose pointing to another direction. Such are unlawful and tumultuous assemblies, riots, routs, and affrays, which are not directly aimed at any one of the bystanders, and yet they tend more or less inevitably to bring the same kind of intimidation or terror to bear upon him as if they were. The injury and interference to one or more individuals is the same, but those engaged in the proceeding, being intent on another object, bring about their evil effects in a somewhat more circuitous way. The peaceably disposed citizen is, however, equally wounded and made uneasy in the enjoyment of his security.

Though the widest toleration is now allowed by the law to the meeting of citizens to discuss and deliberate on affairs in which they take an interest, yet there may be large meetings held with a view to intimidate particular persons or classes, and to coerce the latter into doing something which otherwise is not likely to be done. Under the latter class of assemblies may be ranked all attempts by multitudes to coerce the crown, or the parliament, or the government, and which are more properly treated either as offences against the legislature, or the executive government, or offences which consist in an unlawful exercise of the liberty of thought and speech. Thus, a meeting has been deemed unlawful which affected to be a convention to discuss and entertain propositions relating to the public government of the country, for this was said to tend

directly to supersede the form of government already constituted.[1] The subject of unlawful meetings, so far as these are seditious and tend to interfere with government, more properly belongs, partly to the division of "government," and partly to that division of the law entitled "security of thought and speech," which will be treated of hereafter. There may, however, be designs entertained by large meetings of persons besides coercing the executive government, and these may have the effect of terrifying individuals who are bystanders and disturbing seriously their occupations. Such meetings are equally condemned by the law, and are commonly called unlawful assemblies, routs, and riots.

Unlawful assembly distinguished from riot, rout, affray.—What distinguishes an unlawful assembly from a riot and a rout is the extent to which the common object has been carried out. If the common purpose has not gone further than the mere tumultuous assembling together, and rests only in intention, it is an unlawful assembly. If some further intermediate step, though not yet amounting to an overt act, has been taken, as, for example, the movement of the crowd towards the intended scene of operations has begun, but still no further overt act has been actually done, it is in that stage called a rout. And, finally, if some overt act has begun towards the carrying out of the purpose, and the design is in course of execution, it is then called a riot. There are thus three degrees of this unlawful meeting—an unlawful assembly—a rout—and a riot—each of which must be noticed. Again, the mutual confederation and agreement in one design is that which distinguishes a riot from an affray, for when a large crowd is collected and one or two suddenly quarrel and fight, this amounts only to an affray between those immediately engaged, and does not necessarily implicate the rest of the bystanders. An affray thus differs from a riot in the want of a premeditated and common design.[2] And while several persons must concur in order to constitute a riot, yet the mere incitement to a riot is of itself an indictable misdemeanour.[3]

Rout.—Before proceeding more particularly to state the

[1] R. v Fursey, 6 C. & P. 81. [2] 1 Hawk. P. C. c. 65, § 3. [3] 1 Russ Cr. 382 (4th ed.).

law affecting riots it may be well to dispose of that lower degree of the same thing called a rout, which is seldom met with as a specific offence. It is only an inchoate riot, being not crowned with any overt act developing the common purpose. It is deemed, however, in this incipient stage a specific offence, and punished as a misdemeanour with fine and imprisonment; and security of the peace may also be imposed on the conviction of those who take part in it.[1]

How riot distinguished from high treason.—The purpose or bond of union in cases of unlawful assembly and riot is sometimes difficult of definition. It has often been said that in order to distinguish riot from high treason, or what once was deemed high treason, it is necessary to see if this purpose is or is not some general and universal redress of rights. For example, it is said to be no longer a riot, if the object be to demolish all the bawdy-houses or all the popish chapels, or all the inclosures in the kingdom, since this strikes at the foundation of law and government; but it must be of more private and local nature, such, for example, as to demolish the fences of some particular inclosure, to gain possession of some parish tenement, the interest in which is claimed only by some individuals or local community. And hence the purpose of a riot is said to be one of a private or local nature only.[2] Kelyng, C. J., indeed ruled that a mob of apprentices, who went and pulled down some brothels, were guilty of high treason, because they had a captain, and an ensign, and weapons. He said further that to go about any public reformation is high treason, for "if every man may reform what he will, who is safe?" And he added, "that rebellion first began under the pretence of religion and the law, and the devil hath always this vizard upon it." But though all the judges agreed this was good law, it is noted that Hale, C. B., dissented and thought it only a misdemeanour.[3] It would be difficult in modern times to see the connection between treason and the limited and partial purposes which have sometimes been identified on such principles, as those stated by Kelying, with that imperial offence.

[1] Vin. Abr. Riots; 1 Hawk. c. 65, § 12; 1 Hawk. c. 65, § 8.
[2] 1 Hawk. c. 65, § 6.
[3] 6 St. Tr. 879.

Riot as regards the mutual liability of those engaged in it.—A riot is when three or more persons assemble together of their own authority with an intent mutually to assist each other, and to resist all those who should oppose them, and with a further intent to break the peace; and this likewise for a private purpose.[1] Three persons are the smallest number who must be engaged in this offence, for much of the criminality consists in the likelihood of danger arising out of mere numbers so acting. And for that reason it is that women as well as children above the age of fourteen, if mixing in the crowd, will incur the same liabilities as adult males, unless their presence can be otherwise explained.[2] It is a species of offence in which persons may become involved almost without knowledge or premeditation. Hence whenever a person joins a crowd, which is acting riotously, he must take care to get out of it with the least delay, as his presence is presumably an encouragement, and at least goes to swell the number and inspire terror in third parties; and so the burden of proof is thrown on him, who is found in the crowd, to prove that he was an involuntary associate.

One of the rules of law, therefore, is, that all who are members of a riotous crowd are principals, and the wearing of a badge or the making of signs is good *primâ facie* evidence of being animated by the common design, and what each does, though perhaps on the spur of the moment, is deemed impliedly authorised by all the rest. An ambulatory partnership for the time being binds all together in one common liability, and makes each answerable for the wrongful acts and mischiefs done by all the others.[3] The general characteristic of guilty participation in a riot thus being, that many act in furtherance of the common object, if there are riotous speeches made, the speakers are guilty of what follows, though they may have retired before the actual disturbance begins.[4] And for the like reason, he, who joins at the latest stage, cannot escape liability by saying that he was no sharer in the original design.[5]

[1] *Per Heath*, J., 26 St. Tr. 523. [2] 2 Salk. 594; 1 L. Raym. 484; 1 Hawk. c. 65, § 14; 1 Hale, P. C. 20. [3] Clifford *v* Brandon, 2 Camp. 367; R. *v* Royce, 4 Burr. 2073; R. *v* Billingham, 2 C. & P. 234; R. *v* Perkins, 4 C. & P. 537. [4] R. *v* Sharpe, 3 Cox, C. C. 288. [5] R. *v* Grampound, 2 L. Raym. 965; Anon. 6 Mod. 43.

Riot as to its origin and common purpose.—The unlawfulness of a riot may be manifested in different ways. The avowed object may be unlawful in the first instance, or an object, in itself lawful, may be sought to be carried out by unlawful means; or an object may be in the first instance lawful, but in the course of the proceedings this object may change into something unlawful. Numbers of people often meet, under a common sense of injustice, to redress an outrage on what they suppose to be their rights, and in the heat of the moment are carried much further than they intended. Hence the origin, nature, and development of the motives and actions require to be scrutinised, before the respective criminality of parties can be rightly ascertained. While an essential ingredient in the offence of unlawful assault and riot is the apprehension or terror caused to third parties, it is not necessary that the persons engaged in it should actually commit a breach of the peace; it is enough if they cause, not the nervous and weakminded, but one or more persons possessed of reasonable firmness, to apprehend that a breach of the peace is likely to be committed and is imminent.[1] And if even one person is reasonably alarmed, this is all that is needed to complete this ingredient of the offence.[2] Where the persons assemble with the view not of doing an unlawful overt act, but merely to display their numbers and power, the offence, if anything, is rather that of an unlawful assembly than of a riot, as, for example, where numbers of people ride about with weapons in an unusual manner.[3] On the other hand, if the degree of intimidation is not sufficient to constitute a riot, the meeting may be unlawful from the mere fact of the object being to do a lawful act with unlawful and unnecessary violence, in which case the offence may be an unlawful assembly.[4] And where numbers of persons meet for a lawful purpose, and their purpose changes into an unlawful one, those who take part in the latter purpose are in the same position of guilt, as if they had originally entertained such purpose. But that kind of common purpose which distinguishes a riot is not to be confounded with a mere

[1] *Per Mansfield*, C. J., Clifford *v* Brandon, 2 Camp. 367. [2] R. *v* Phillips, 2 Mood. C. C. 252. [3] R. *v* Pugh, Holt cas. 635. [4] R. *v* Stroude, 2 Show. 150; R. *v* Cox, 4 C. & P. 538.

quarrel or fight between the parties themselves, in which case there may be an affray, though no riot.[1]

The more frequent origin of a riot is the general sentiment, that a public right has been invaded and requires to be vindicated by the force of numbers and a species of physical intimidation. Thus it is where many people have been excluded from the exercise of a right of common and pull down fences to a greater extent than is necessary to exercise their right,[2] or where they join in some diversion which may be carried on in a tumultuous and violent manner, and in a public place, as playing at foot-ball in the public street.[3] And to encourage a premeditated prize-fight, is also an origin of riot.[4] On one occasion, where many persons, offended at a rise of prices in a theatre, went purposely to the pit and hissed and hooted, rung bells and blew horns, so as to drown the voices of the actors and make the performance inaudible, it was held they were all guilty of a riot, though no personal violence was actually done to any one individual, and no injury done to the house.[5] And when a lion-fight took place at Warwick in 1826, the Attorney-General (Copley) told the House of Commons, that it was a riotous and illegal assembly, and might have been dispersed by the magistracy.[6]

How far one may assemble friends for self-defence.—But though the carrying out even of a legal object with the aid of numbers in a tumultuous manner makes the offence of riot, it does not follow that in no case whatever is it legal for one person to be assisted by several persons. On the contrary, there may be situations in which a person may be aided by his friends or neighbours in doing something even in public, which makes their conduct punishable neither as a riotous nor as an unlawful assembly. And here arises a distinction between one's house and one's fields. Though it would be unlawful to assemble numbers to defend the possession of a close or field claimed by one of them, still, if it is to defend the peaceable possession of a house, this will be deemed justifiable, owing to the greater

[1] R. *v* Ellis, 2 Salk. 595; 1 Hawk. c. 65; R. *v* Corp. of Grampound, 2 L. Raym. 965. [2] R. *v* Wyvill, 7 Mod. 286. [3] 1 Hawk. c. 65, § 5. [4] R. *v* Billingham, 4 D. & R. 127; 2 C. & P. 234; R. *v* Perkins, 4 C. & P. 537. [5] Clifford *v* Brandon, 2 Camp. 358. [6] 14 Parl. Deb. (2nd ser.) 651.

degree of protection thrown round the house or castle,—which is deemed a sanctuary,—than round the lands and fields where no one dwells.[1] In other cases it depends chiefly on the peaceable manner in which the people assemble and act, whether the crowd is riotous or not, for if by their conduct they neither break the peace nor cause any reasonable apprehension of so doing, then their conduct is not illegal, even though the purpose in view is wrongful. As when a man claiming a log of wood in another's field, goes with his friends to remove it;[2] or where a wear across a river is said to injure the local public in their rights, they may join and with crows of iron and spades remove it.[3] In such cases, however, it is an important ingredient, that no more people should assemble than are reasonably necessary to do the contemplated act. And in all such cases it will be for a jury to decide, whether the circumstances of the assembling transgressed the line of peaceable behaviour, and reasonably inspired terror and apprehension in the minds of the public in the neighbourhood; and to ascertain this result the place and time of meeting and the nature of the speeches must all be considered.[4]

Riots to demolish buildings, machinery, &c.—Though the offence of riot or unlawful assembly is at common law only a misdemeanour, the legislature has singled out from the ordinary cases some attended with peculiar mischief as well as recklessness or malignity in the participators, namely, where the common object is to demolish buildings or machinery. This class of riots is made felony, and punished with penal servitude for life, or two years imprisonment.[5] And if the rioters injure and damage without demolishing, the offence is misdemeanour, punishable with seven years penal servitude.[6]

[1] *Per Heath*, J., R. *v* Bangor, 26 St. Tr. 526. [2] R. *v* Pugh, 6 Mod. 141. [3] Dalton, c. 137. [4] R. *v* Vincent, 9 C. & P. 91; R. *v* Neale, ib. 431.

[5] 24 & 25 Vic. c. 97, § 11; 27 & 28 Vic. c. 47, § 2. The punishment is penal servitude for life, or for not less than five years, or imprisonment for not less than two years, with or without hard labour, and with or without solitary confinement.

[6] 24 & 25 Vic. c. 97, § 12; 27 & 2 Vic. c. 47, § 2. This punishment is penal servitude not exceeding seven, and not less than five, years, or imprisonment not exceeding two years, with or without hard labour. A variety of buildings are enumerated in the statute, as

In applying these enactments, it has been held that a person present and aiding at part of the mischief, such as the burning of a house, though not at the firing of it, is equally guilty.[1] And where the mob attack and injure a house, chiefly as a means of getting at and seizing some obnoxious person inside, they may be guilty nevertheless of this statutory offence, especially if the evidence leaves it doubtful whether their object was not twofold.[2]

Individuals stopping a riot.—The duty of individuals to put a stop to a riot was thus expounded by Lord Mansfield. "Every individual in his private capacity may lawfully interfere to suppress a riot: much more to prevent acts of felony, treason, and rebellion. Not only is he authorised to interfere for such a purpose, but it is his duty to do so; and if called upon by a magistrate, he is punishable in case of refusal. What any single individual may lawfully do, for the prevention of crime and preservation of the public peace, may be done by any number assembled to perform their duty as good citizens. It is the peculiar business of all constables to apprehend rioters, to endeavour to disperse all unlawful assemblies, and in case of resistance to attack, wound, nay kill those who continue to resist, taking care not to commit unnecessary violence or to abuse the power legally vested in them."[3] And another learned judge near our own times thus gave his version of the same rights and duties. By the common law every private person may lawfully endeavour of his own authority and without any warrant or sanction of the magistrate to suppress a riot by every means in his power. He may disperse or assist in dispersing those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he shall see coming up from joining the rest; and not only has he the authority, but he is bound under pain of fine and imprisonment, when called upon by the magistrate, to do his utmost in assisting him to suppress any tumultuous assembly. If the riot be general and dangerous, he may arm himself against the evildoers to keep the peace. It is undoubtedly more prudent,

included in this special protection, such as churches, chapels, houses, shops, mills, granaries, county buildings, machinery, mines, &c.

[1] R. *v* Simpson, Car. & M. 669. [2] R. *v* Price, 5 C. & P. 510; R. *v* Batt, 6 C. & P. 329. [3] 21 Parl. Hist. 688.

however, for a private person not to act independently, but to act in combination with and in assistance of the magistrate, sheriff, or constable, for in that way his services are more likely to be effective, and he will have the benefit of the judgment and observations of others also. Yet whatever is honestly done by him in suppressing the assembly will be supported and justified by the common law. And whether he is a private individual or a soldier, his duty is the same in this respect, for a soldier does not cease to be a citizen, though he is more likely to associate himself closely, as he ought to do, with those in authority, and act under their specific instructions. An honest zeal in both according to their separate ability is a duty, and will be a sufficient protection in case of any accidental mistake they may commit.[1]

Remedy against rioters.—The mode of punishing rioters is usually by indicting some of the ringleaders, and where the expense of trying so many is to be avoided, some who are joined in the indictment may enter into a rule to confess judgment if their fellows are convicted.[2] The essential thing to prove on an indictment for riot is the common purpose, and that terror was thereby caused to the queen's subjects.[3] The verdict, in order to stand, must be a verdict of guilty against at least three persons; but if a verdict is found against two, and others included in the indictment had died, and so were not tried, the verdict will be held good, because the two will be presumed to have been guilty with others not tried.[4] The sentence for a riot, at common law, is fine and imprisonment, and the court may require security of the peace, which would be forfeited if the party again formed part of a meeting which the constable had to suppress.[5] And the court may add hard labour to the imprisonment.[6] The costs of prosecutor and witnesses may in such cases be ordered by the court to be paid by the county.[7]

Though the usual mode of proceeding against rioters is by indictment, yet in some of the cases, especially those connected with the administration of justice, or the election

[1] *Per Tindal*, C. J., R. *v* Pinney, 5 C. & P. 261. [2] Anon. 3 Salk. 317; R. *v* Middlemore, 6 Mod. 212; Lofft, 44. [3] R. *v* Hughes, 4 C. & P., 373. [4] R. *v* Scott, 3 Burr. 1262; 2 W. Bl. 291, 350; 2 Hawk. P. C. c. 47, § 8. [5] R. *v* Blissett, 1 Mod. 13. [6] 3 Geo. IV. c. 114. [7] 7 Geo. IV. c. 64, § 23.

of members of parliament, the Queen's Bench Divison will allow a criminal information, but, this being a mere variation in procedure, the punishment is the same in the end.[1]

Early legislation as to putting down riots.—Though the above is the mode of suppressing and punishing riots at common law, there have been various changes in the treatment of this offence effected by statute. An offence like riot, which strikes at the root of all good government, and all security in ordinary employments, has given much trouble to the legislature, as may be supposed, and it is after considerable variety of experiments that a somewhat settled mode of suppressing riots has been adopted and acted on. We may, not without profit, look back a few centuries at the way in which our ancestors sought to put down this most pestilent of social disorders. Soon after the first institution of justices of the peace by Edward III. —a body of gratuitous judges, said to be peculiar to the United Kingdom,[2]—it was seen that their services would be, above all, most effective in cases of riot, and indeed such a contingency was exactly that which they are peculiarly created to deal with. The statute of 34 Edward III. cap. 1, expressly empowered justices to restrain and arrest, pursue and chastise rioters, and authorise others to arrest them. And this statute was held to authorise each individual justice to arrest, though not to try and punish the rioters.[3] Statutes of Richard II. went further, and expressly authorised the sheriffs on attaining knowledge of a riot to go with the strength of the county, and put offenders in prison till due execution of the law be made. And all lords and other liege people of the realm were to attend with all their strength and power upon these sheriffs and ministers.[4] Another statute forbade persons to ride armed, night or day, or to wear a skull of iron or other armour.[5] Again a statute of Henry IV., still more emphatic, made it the duty of two or more justices, with the sheriff, to arrest rioters and draw up a record or certificate of the facts, which was to be equivalent to a presentment of a jury. All persons able to travel were bound under pain of fine

[1] R. *v* Kynaston, 2 Burr. 378; R. *v* Hunt, 1 L. Ken. 108; R. *v* Ingram, 2 Salk. 593; R. *v* Tempest, T. Raym. 336; R. *v* Pugh, 6 Mod. 140. [2] 1 Camp. Chrs. 272. [3] 8 Co. 121; Dalt. c. 22. [4] 15 Rich. II. c. 2; 17 Rich. II. c. 8. [5] 20 Rich II. c. 1.

and imprisonment, to join and assist the justices and sheriff. And the same statute made it the special duty of the justices dwelling nearest to the scene of riot (though other justices were not thereby discharged from a like duty if none of them had taken the duty upon him) to put the statute in force, under a penalty of £100.[1] And by still another confirming statute, if the justices and sheriffs failed in their duty, a party grieved might procure them to be punished for their neglect.[2] And a statute of Mary made it felony for twelve persons to assemble to alter the laws, or to break fences or fenceways, if they did not disperse in one hour after proclamation.[3]

Under these statutes, which are mostly unrepealed, it is an indictable offence for any person of whatever degree to refuse, after reasonable warning, to assist the justices and sheriffs in suppressing riots, by arresting and lodging in prison the rioters; though the lame, and the halt, and the blind, and it is added, women, and clergymen, and infants under fifteen have been held by the courts to be impliedly excused from this duty.[4] And on the same account such persons were entitled to carry arms, and were protected against liability for arrests or assaults committed in furtherance of the duty. The same statutes have made it incumbent on all the justices of the county to see these powers enforced, and though justices are not excused merely because those who reside nearest the scene of riot have not done their duty, yet whenever some justices have taken on them the duty, the rest are then excused from interfering,[5] though they require to be vigilant to see that the machinery shall in no case break down for want, at any moment, of acting justices. The chief responsibility in cases of riot, it will thus be seen, lies not with private individuals, but with justices of the peace, for they are to set in motion the machinery for restoring order and to judge when it will be prudent to resort to force, and if need be, to deadly weapons, if no other means suffice. They may act not only on their own view of the situation, but also on the credible information of others. But while these ancient statutes give ample power and encouragement to justices, and though

[1] 13 Henry IV. c. 7; 19 Henry VII. c. 13. [2] 2 Henry V. c. 8. [3] 1 Mary, st. 2, c. 12; 1 Eliz. c. 15. [4] 1 Hawk. c. 65. [5] 1 Hawk. P. C. b. i. ch. 65, § 46.

the Star Chamber was peculiarly zealous in assisting to punish riots,[1] it was found that some improvement was needed in the machinery for arresting and suppressing so dangerous an offence, and at length, in 1714, a new act, since called the Riot Act,[1] was passed, which still governs the subject, and requires particular notice.[2]

Reading the riot act.—The riot act does not deal with every kind of riot, but singles out those in which twelve or more persons join, and its chief object is to enable the justices to take early steps and to administer a solemn warning. If that warning is neglected, or deliberately set at naught, the rioters incur serious guilt, and are subjected to very severe and summary treatment. This riot act was deemed so important, that it was directed to be read openly at every quarter sessions as a standing order to be known by heart by its chief administrators.[3] Much turns upon the exact language of the statute. If twelve or more persons be assembled unlawfully, riotously, and tumultuously, and, being commanded by proclamation by one or more justices or sheriffs or mayor, to disperse peaceably, shall nevertheless continue together riotously for the space of an hour, then they become from that moment guilty of felony, and it is equally a felony to wilfully obstruct those who make this proclamation.[4] The punishment, which was declared in 1714 to be capital, was in 1837 reduced to penal servitude for life, or for not less than fifteen years, or imprisonment for three years with hard labour, together with solitary confinement. This confinement, however, cannot exceed three months in the year, or more than one month at a time.[5] And the prosecution, being severe, must be commenced within twelve months after the offence is committed.[6]

The riot act, though useful and often necessary as a means of more speedily suppressing riots and overawing the rioters, is by no means an essential towards this result. It enhances the guilt of the parties who disobey the law after its provisions have been brought to bear on the situation, but if it is not resorted to, the riot, nevertheless, still remains punishable under the common law and the earlier statutes.[7] This proclamation enjoined by the riot

[1] Hudson, Star Ch. 82. [2] 1 Geo. I. st. 2, c. 5. [3] 1 Geo. I. st. 2. c. 5, § 7. [4] 1 Geo. I. st. 2, c. 5. [5] 1 Vic. c. 61. [6] 1 Geo. I. st. 2, c. 5, § 8. [7] R. *v* Fursey, 6 C. & P. 81.

act, which is directed to be made in a loud voice as near the rioters as can safely be done, is a leading feature in the machinery. It is set forth in the statute, and is as follows:—"Our sovereign lord the king chargeth and commandeth all persons being assembled immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act of King George for preventing tumults and riotous assemblies. God save the King." Every justice, sheriff, mayor, or bailiff is required on notice of such a riot to resort to the scene and cause such a proclamation to be made.[1]

Duty of justices after proclamation of riot.—When the proclamation is made, or, as it is commonly said, when the riot act has been read, the justices and sheriffs and peace officers may command all her majesty's subjects of age and ability to render active assistance in seizing and apprehending the rioters. And it is expressly added that if the rioters shall happen to be killed, maimed, or hurt in the efforts to disperse and seize them, those using such efforts shall be free from all blame whatever.[2] If any of the rioters attempt to escape after the hour limited has expired, they are liable to be seized by any person and carried before a justice of the peace.[3] And even though a person be not present during the whole of this hour of grace, he will come within the penalties of the statute if found during part of the hour.[4] Moreover, if the riot act be read more than once, the second reading does not supersede the first, and the computation of time must be taken from the earliest date.[5]

In applying this important statute, it is to be borne in mind that it is not left to the mere discretion of the justice to decide conclusively that a meeting is a riotous assembly; all that is meant, is, that, if it is a riotous assembly, and he make the proclamation, then the offence, instead of being a misdemeanour, will be turned into a felony.[6] And hence in any indictment it is necessary to prove that the

[1] 1 Geo. I. st. 2, c. 5, § 2. [2] 1 Geo. I. st. 2, c. 5, § 3. [3] 1 Geo. I. st. 2, c. 5, § 3. [4] R. *v* James, 1 Russ. Cr. 277. [5] R. *v* Woolcock, 5 C. &. P. 516. It has been said that if the words "God save the Queen," are omitted, the proclamation will be insufficient.—R. *v* Child, 4 C. & P. 442; *sed quære.* [6] R. *v* James, 5 C. & P. 154.

assembly was, in point of fact, of a riotous character, and justified the justice in his proclamation. It is part of the ordinary duty of all justices of the peace under their commission to put down an unlawful assembly and a riot. In this difficult conjuncture their judgment, sagacity, and firmness are put to a severe trial, for they are bound to hit the mark—not to hesitate when the moment of action has arrived, not to go a hairsbreadth beyond the severity needful to stamp out the fire. And hence magistrates are sometimes indicted for breach of duty in not suppressing a riot, as was the case of the lord mayor of London in 1780 and the mayor of Bristol in 1832.[1] In urgent cases the military may act without directions from the civil magistrates; and in the Gordon riots in 1780, when the king issued a proclamation and directed the military to disperse the rioters, and in consequence nearly 300 lives were lost, and half of that number more were wounded, it was held by Lord Mansfield that as the insurgents were engaged in overt acts of treason, felony, and riot, it was the duty of every subject of his majesty, and not less of soldiers than of other citizens, to resist them.[2] And Lord Mansfield used to say that he was himself to blame for not having on that occasion directed force to be repelled by force, it being the highest humanity to check the infancy of tumults.[3]

One of the most delicate duties to which a justice of the peace has to address himself in the sudden excitement of a riot is when to resort to the aid of military force. A jealousy invariably dogs his movements at this critical point. If he is a moment too early in bringing this last resort to bear, he is too often stigmatised as tyrannical or brutal; if he is a moment too late, he is branded as imbecile and cowardly. Between these two extremes hundreds of critical eyes watch every step, and are seldom slow to mark and record every error in judgment. The duty of the justices of the peace on hearing of a riot is to meet and concert measures. Their first power is to swear in special constables under the statute of 1 & 2 William IV., c. 41; and if these be insufficient, they may request the

[1] R. *v* Kennett, 5 C. & P. 282 n.; R. *v* Pinney, 3 B. & Ad. 947; R. *v* Neale, 9 C. & P. 431. [2] 21 Parl. Hist. 690, 1305. [3] Ersk. Speeches.

nearest military force to come to their assistance.[1] As to the further stages, it is difficult to say more than that the duty of the justices is to act with discretion and ordinary firmness in the circumstances, both in warning the peaceable and subduing the violent; and if they can be shown to have done this, they are free from blame, however unsuccessful in their efforts to subdue the disturbance.[2] It is not at all necessary that they should in person take any active part in using force.

Duty and discretion in using military force in riots.— Ever since the passing of the Riot Act great jealousy has been shown by the people as to the interference of the military, and as the reign of severity often begins with this last extremity in the proceedings, it has been too often the habit, even of legislators, to denounce without thought this step as if it were an invasion of popular rights and an affront upon all the peaceably inclined. But several great authorities have from time to time corrected this delusion,[3] and shown that military assistance is a

[1] Burdett *v* Colman, 14 East, 164 ; 3 Stark. 92.

[2] R. *v* Pinney, 3 B. & Ad. 947 ; 3 Stark. 105.

[3] LORD HARDWICKE : "Our soldiers are our fellow-citizens. They do not cease to be so by putting on a red coat and carrying a musket. It is well known that magistrates have a power to call any subject of the king to their assistance to preserve the peace and to execute the process of the law. The subject who neglects such a call is liable to be indicted, and being convicted, to be fined and imprisoned for his offence. Why, then, may not the civil magistrate call soldiers to his assistance as well as other men? While the king's troops act under the directions of the magistrate we are as much under civil government as if there were not a soldier in the island of Great Britain. The calling in of these armed citizens often saves the effusion of innocent blood, and preserves the dominion of the law."—9 *Parl. Hist.* 1294.

LORD LOUGHBOROUGH : "It has been imagined, because the law allows an hour for the dispersion of a mob to whom the riot act has been read by the magistrate the better to support the civil authority, that during this period of time the magistracy are disarmed, and the king's subjects, whose duty it is at all times to suppress riots, are to remain quiet and passive. No such meaning was within the the view of the legislature ; nor does the construction of the act warrant any such notion. Magistrates are left in possession of those powers, which the law had given them before ; if the mob collectively, or a part of it, or any individual within and before the expiration of that hour attempts or begins to perpetrate an outrage amounting to felony, it is the duty of all present, of whatever

natural step in the development of all riotous assemblies, and instead of aggravating the evil, seldom fails to cure it when judiciously handled. When society has been resolved into first principles, a resort to the strongest and sharpest weapon of self-defence is dictated by the voice of nature itself. Soldiers are merely citizens, who by their profession are trained to act in unison, and to bring the maximum of physical force to bear at any critical moment, when force is everything. And as all citizens are amenable to the call of the magistrate, it is natural and inevitable that they as the strongest citizens for the moment, should be required in their turn to act, or be welcomed when they come without being required. Yet they must always act on the same principle as all other citizens must act, namely, when they repel force they must repel it by just sufficient force and no more to overcome the resistance offered. When that is the rule observed, it can be of no

description they may be, to endeavour, by the most effectual means, to stop the mischief and to apprehend the offender."—21 *St. Tr.* 493.

LORD MANSFIELD: "Much mischief has arisen from a misconception of the riot act, which enacts that, after proclamation made that persons present at a riotous assembly shall depart to their homes, those who remain there above an hour afterwards shall be guilty of felony and liable to suffer death. From this it has been imagined that the military cannot act, whatever crimes may be committed in their sight, till an hour after such a proclamation has been made, or, as it is termed, the riot act is read. But the riot act only introduces a new offence—remaining an hour after the proclamation—without qualifying any pre-existing law, or abridging the means which before existed for preventing or punishing crimes."—21 *Parl. Hist.* 688.

TINDAL, C. J.: "The law acknowledges no distinction between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation, and invested with the same authority to preserve the peace of the king as any other subject. If the one is bound to attend the call of the civil magistrate, so is the other. If the one may interfere for that purpose when the occasion demands it without the requisition of the magistrate, so may the other too. If the one may employ arms for that purpose when arms are necessary, the soldier may do the same. Undoubtedly the same exercise of discretion, which requires the private subject to act in subordination to, and in aid of, the magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a still stronger degree with a military force."—*Per Tindal,* C. J., R. *v* Pinney, 5 C. & P. 263.

consequence what is the weapon used, or how many kinds of weapons of varied strength one after the other, so long as each in succession is not used a moment too soon.

Remedy for property injured by rioters.—As riots, over and above the terror they inspire, frequently end in the destruction or injury of private property, and it would be most unjust that such private loss should go without compensation, and yet it may be difficult to fix on the party really responsible, care has been taken, ever since the Riot Act of 1714, to provide a remedy sufficient to recoup innocent proprietors; and the remedy provided is a proceeding against the hundred, if in a county, and against the town or liberty if elsewhere. In other words, the inhabitants of the district have to pay the damage done by this social outbreak. The enactment now providing for recourse in case of riot against the hundred was revised in 1827. It specifies chapels, houses, buildings, and machinery, shipwrecks, and other things, and declares that if these shall be feloniously demolished or destroyed, wholly or in part, the hundred or such like district shall be liable to yield full compensation to the person damnified, not only for the damage done to the buildings or subjects, but also for any damage at the same time done to the fixtures, furniture, or goods in such buildings or erections. The chief qualification is, that the person injured shall within seven days after the offence go before a justice of the peace, and state on oath the names of the offenders, if known, and the other circumstances, and become bound by recognisance to prosecute the offenders when apprehended.[1] If the scene of the riot is in a city, or town, or liberty, not subject to the county rate, a like remedy is obtained against a peace officer of the place, and a rate is then made by him on the inhabitants, so as to make up the sum required.[2] In all cases above 30*l.* damage, the remedy is by action, and this must be commenced within three calendar months after the offence committed. The action is nominally against the chief constable of the district, who is bound to go to two justices of the peace, who in some cases will consent to his suffering judgment to go by default. The treasurer of the county ultimately pays the

[1] 7 & 8 Geo. IV. c. 31, §§ 2, 3; 2 & 3 Will. IV. c. 72; 17 & 18 Vic. c. 104, § 477. [2] 7 & 8 Geo. IV. c. 31, § 15.

expense in the first instance, and the justices of the peace in general or quarter sessions levy a rate on the inhabitants of the hundred or district, to reimburse the treasurer and constable.[1]

In cases where the damage done by the rioters is 30*l.* or less, a written statutory notice of the claim must be given, within seven days after the offence, to the chief constable, who is to exhibit the same to two justices of the peace. These justices appoint a special petty session of all the justices in twenty days thereafter, for the purpose of hearing and determining the claim. When they settle the claim, they make an order on the treasurer of the county or borough fund, and ultimately a rate is made for reimbursement on the inhabitants of the county or town.[2] In all such cases, as the statute has given the specific remedy, that remedy must be pursued, and the directions therein contained scrupulously followed.

In applying these statutes, the compensation given to the individual has been interpreted to mean the expense of replacing the premises in their former state.[3] And as a reversioner may be damnified as well as a tenant in possession, his claim also is made good.[4] And the statute enables the rector, vicar, curate, or chapelwarden to make the claim in respect of any church or chapel injured.[5] By this process a somewhat rough kind of justice is done in making all those who have property in the locality share the burden of the disorders that break out in their neighbourhood, and as to the origin of which they may all have either in some way contributed, or at least have had more to do than remoter neighbours.

What is an affray?—After riots, routs, and unlawful assemblies, there still remains another specific offence which tends to cause terror and apprehension to bystanders, and requires some notice. An affray is, strictly speaking, nothing more than an assault committed in a public place and in a conspicuous manner, and is so called because, as Coke says, it affrighteth and maketh men afraid.[6] Such a case occurs where two persons fight in

[1] 7 & 8 Geo. IV. c. 31, §§ 3, 6, 7; 32 & 33 Vic. c. 47. [2] 7 & 8 Geo. IV. c. 31. § 8. [3] D. Newcastle *v* Broxtowe, 4 B. & Ad. 273. [4] Pellew *v* Winford, 9 B. & C. 135. [5] 7 & 8 Geo. IV. c. 31, § 11. [6] 3 Inst. 158.

the street or any place frequented by the public.[1] And even if a person go about in a threatening manner with any formidable weapon, he may be guilty of an affray, and so be bound to his good behaviour;[2] and the same if, after assaulting or being assaulted, he threatens in a public place to renew such assault.[3] The statute of 2 Edward III., c. 3, called the Statute of Northampton, with a view to prevent this ready resort to physical force, enacted, that no person, except the king's servants in his presence or his officers of justice, should go about, or ride, armed, otherwise such arms were to be forfeited, and the wearer was liable to imprisonment, and the justices, sheriffs, and lords of franchises were made punishable for not seizing such person.[4] And statutes of Richard II. again forbade others than those excepted to ride armed.[5] The first statute was, however, interpreted only to prohibit the wearing of arms and weapons in such a manner as to cause terror, as by going to church at the time of divine service with a gun; but not when this was done merely for the wearer's own protection.[6] And for a like reason, if a man for purposes of self-defence assemble his friends in his own house so as to protect himself, this is no affray, and such step is quite competent to all men.[7]

An affray does not consist in mere angry and hot words, for so long as no individual is actually threatened, none need be affrighted. And if any one is personally afraid, the remedy is to apply for articles of the peace; or the constable, and he alone, may arrest the threatener, in order that the latter may be taken before a justice and bound over to keep the peace.[8] An affray differs on the one

[1] 1 Russ. Cr. 406 (4 ed.). [2] R. v Knight, 3 Mod. 117. [3] Price v Seeley, 10 Cl. & F. 28.

[4] 1 Hawk. c. 63, § 5; Case of Armes, Poph. 121; Cro. Eliz. 294. There was also a law in Athens against going into an assembly armed.—*Smith's Dict. Diocles.* And the Spartans made a law against going into an assembly with staves, because one once put out Lycurgus's eye.—*Plut. Lycurg.* In the time of Henry VIII. it appeared a Welshman was prohibited from entering a court of justice carrying arms.—26 *Hen. VIII.* c. 6. But this was only a repetition of the law of Plautus Sylvanus.—5 *Univ. Hist.* 51.

[5] 7. Rich II.; 17 Rich. II. c. 1, repealed by 19 & 20 Vic. c. 64. [6] 1 Hawk. 63, § 8; 3 Mod. 117; 2 Bulst. 330. [7] 24 Edw. III. c. 33; 21 Hen. VII. c. 39; 3 Inst. 161. [8] 1 Hawk. c. 63; Dalt. c. 8; Howell v Jackson, 6 C. & P. 723.

hand from an assault, and on the other hand from a riot. An assault may take place anywhere; an affray must be in a public place. A riot must be joined in by at least three persons, while one person may be guilty of an affray.[1] A prize fight may be fought in so private a manner as to give rise to no offence other than assault.[2] Or it may begin as an assault, and soon turn into an affray by constables arriving and suffering resistance.[3] An instance of an affray is where a fight is carried on in a public place, in which case all present and encouraging are guilty of the offence of affray.[4] And where parties have promoted the fight, they may be guilty of a riot as well as an affray.[5] For the same reason a duel, if carried out in a place of public resort, is an affray in addition to its becoming a crime of murder or manslaughter according to the circumstances and the result. Even a forcible entry into one's own land, or to recover one's own goods, may be an affray, if force be used, and if numbers of persons join.[6]

Who may stop an affray.—The rule as to an affray is, that any person whatever, who witnessed it, is justified in using force to seize and deliver to a constable one of the affrayers, and if the affrayer is hurt or wounded in the attempt, the person so seizing or wounding him, if the force used was no more than was reasonably adapted to secure the object in view, will nevertheless be justified in his act.[7] Not only is a bystander justified in interfering to arrest an affrayer, but if he be reasonably able to interfere with effect, and refuse to assist a constable when asked, he will be liable to indictment, and to be fined and imprisoned; for though this offence is seldom prosecuted, all are liable to such an occasional duty.[8] A bystander seizing an affrayer is not bound to keep him in his personal

[1] 1 Hawk. P. C. c. 28 § 2. [2] R. *v* Hunt, 1 Cox, C. C. 177. [3] R. *v* Bellingham, 2 C. & P. 234. [4] R. *v* Perkins, 4 C. & P. 537. [5] R. *v* Bellingham, 2 C. & P. 234. [6] Anon. 3 Stark. 187. [7] 1 Hawk. c. 63, §§ 11, 12; 3 Inst. 158; Timothy *v* Simpson, 1 C. M. & R. 757. [8] R. *v* Wilburn, Noy, Rep. 50; R. *v* Brown, Car. & M. 314; R. *v* Pinney, 5 C. & P. 261.

The Egyptians made it a capital crime not to assist a man when assaulted or murdered, or failing that, to discover and prosecute the offender; the punishment in this last case was whipping and starvation for three days.—*Herod.: Diod. Sic.*

custody, but is justified in detaining him a reasonable time until a constable can be found to take charge of him. And for the same reason, if he has been attacked by the affrayer, he may seize and detain the latter a reasonable time.

A constable is bound to arrest all persons whom he sees committing or about to commit an affray,[1] taking care, however, not to interfere so long as the contention is one merely of angry words.[2] He is also bound to receive into custody any affrayers on the report of one who saw the affray committed, though in that case he must exercise his own judgment as to the credibility of the informant.[3] And he may likewise pursue an affrayer and break into a house in order to effect an arrest, though he ought first to demand admission peaceably.[4] And while he cannot be lawfully obstructed, yet if one peaceably resist him while arresting the affrayer, he may arrest the person so obstructing, though he will not be justified in giving such person a blow.[5] While a constable may arrest an affrayer who is actually committing or about to commit the offence, yet if the affray is over, he then can no longer, though a witness to the offence, arrest the affrayer. He must in that event get a warrant from a justice of the peace unless indeed he has reason to believe that the affray will be renewed, or unless he is in fresh pursuit of the affrayer.[6]

A justice of the peace, whose primary business is to see the peace preserved, may, like ordinary persons, actively interfere by seizing an affrayer if the affray is committed within his view; but if the offence is committed out of his view, he can only grant a warrant in the usual way to bring the affrayer before him or to bind the affrayer to keep the peace.[7]

Punishment for an affray.—The judgment in case of this offence is fine and imprisonment, besides being called upon to find surety to keep the peace. Formerly part of

[1] 1 Hawk. c. 63, §§ 14, 15. [2] Howell *v* Jackson, 6 C. & P. 723. [3] Derecourt *v* Corbishley, 24, L. J., Q. B. 313; Cook *v* Nethercote, 6 C. & P. 741; 2 L. Raym. 1296; Griffin *v* Coleman, 4 H. & N. 265. [4] Ibid. 1 Hawk. c. 63. [5] Levy *v* Edwards, 1 C. & P. 40. [6] Cook *v* Nethercote, 6 C. & P. 741; R. *v* Walker, Dearsl. 358; R. *v* Light, D. & B. 332. [7] Hawk. P. C. §§ 18, 19; Still *v* Walls, 7 East, 536; R. *v* Bellingham, 2 C. & P. 234.

the punishment, when the offence was committed in the royal palace, was the loss of the right hand.[1] And it was once the law that affrays, or even hot words, which passed in a church or churchyard, were more severely punishable than if they passed elsewhere, for the party offending was liable to have one of his ears cut off, and to be excommunicated.[2] Nor was it deemed an excuse that another assaulted him first.[3] This distinction is now, however, abolished in all except the name.[4]

[1] 1 Hawk. c. 21, § 1. [2] 5 & 6 Ed. VI. c. 4, § 26 (now repealed). [3] Cro. Ch. 467 ; Noy, 171. [4] 23 & 24 Vic. c. 32, § 2 ; 24 & 25 Vic. c. 100, § 42. The offence of disturbing divine worship in church or chapel, belongs to the head of "Security of public worship." See also Chap. III. *post*.

CHAPTER II.

ACTUAL INJURY TO THE BODY BY THE NEGLIGENCE OF OTHERS.

Injury to the body by negligence of others.—While the law accords protection to the body against all attacks caused by wilfulness or malice—from the most deadly to the most trifling, from murder to the pettiest assault,—this is not sufficient; for there is still a class of injuries which are caused wholly without malice, and wholly without any intention to do injury, and yet the suffering and loss may be the same, while the cause is different. Where the body is directly injured by the act or default of another, so that pain, suffering, or death ensues, this requires also a remedy. And the law has given such a remedy to the sufferer, or, if the injury is fatal, then to his representatives, against the person who is the author of the negligence.

The foundation of this class of injuries and remedies is undoubtedly this, that while each person has the same right as another to pursue his lawful occupations, each is bound, on that very account, to bear always in his mind, that there are others in the world besides himself, who are just as intent on business, or pleasure, or gain, as he is. Unless, therefore, he observes some degree of care, and takes some pains not to come into collision with his neighbour, there will be indefinite mischief and injury, not to speak of irritation and hot blood. It is matter of common experience, that there is a right way and a wrong way of doing most things—a careful, and prudent, and considerate way, and a reckless, imprudent, and unscrupulous way; and that, while recklessness exists, on one side or on both sides, there cannot fail to be injuries and collisions, more or less serious to one or other.

Negligence distinguished from accident.—At the same time it is equally matter of experience, that there are many events dangerous to life and limb, which are wholly beyond human control, which no sagacity can foresee or provide against, and yet which constantly thwart human schemes, but which involve no blame whatever to any third person, and consequently ought not to involve any loss or punishment. The ills, that flesh is heir to, are often wholly separable from any human culpability; or may be too subtle to attract the notice of the law. In such a case each individual must submit, as if to an inevitable mischance. These two distinctions—one involving, and the other not involving, culpability, are usually known to the law under the head of negligence and of accident. If the act of one person is so closely connected with the suffering or loss of another that one is the immediate cause, and the other is the immediate consequence, then a liability of the former person to make good the loss of the latter person arises out of the circumstances. Why this should be, scarcely requires explanation. Human life abounds in dangerous situations, and if each were to act recklessly, few would be safe from wrong and injury. At the same time, if no connection of cause and effect between the two things can be traced, or if it be too far-fetched, or if no connection beyond what is inevitable and blameless can be discovered, then no such liability arises, and each must bear his own losses. The loss is then a mere accident, for which no remedy is provided to the one, because no culpability can be traced to the other. The difficulty of applying this rule arises from the infinite variety of circumstances and mutual relations, to be examined and to be classified under the one head or the other: under blamable or actionable negligence, and under inevitable or blameless accident.[1]

Where injury to the body is fatal.—Though the rule of law has always been established, that injury caused to the body by the negligent acts of another was a cause of action, still another maxim was in force, namely, *actio personalis moritur cum personâ;* so that, if the sufferer

[1] The Brehon law had most elaborate rules for determining when an accident did or did not give rise to compensation.—3 *Anc. L. Irel.*

was killed by the negligent act, the right of action died with him, and his executors or relatives could not found any claim. This anomaly, namely, that, if a person had been only injured to a slight degree, the wrong-doer was liable in heavy damages, whereas, if the injury had been so great as to be fatal, the wrong-doer wholly escaped liability, was put an end to by Lord Campbell's Act in 1846,[1] which gave a right of action, on nearly the same ground, to the executor, or administrator, or near relatives, in certain cases, as the person would have had for a less sum, if he had been merely wounded but not killed.[2]

The passing of the act 9 & 10 Vic. c. 93, thus gave a great impetus to remedies for injuries to the person, by enabling the relatives of those persons who have been killed, in what are frequently called railway and like accidents— but which are deemed negligent acts by the law, when they serve as a basis of compensation—to sue and recover damages for the loss of life by such persons, or rather for the loss of the benefits derived through such life. The action for actual injuries to the person being founded not on accident, but on negligence on the part of the person who was in charge of the conveyance, process, or operation, in connection with which the injury arose, and the

[1] 9 & 10 Vic. c. 93 ; 27 & 28 Vic. c. 95.

[2] This principle, that the cause of action dies with the injured person, is of uncertain origin in English common law, and the recital to the statute 9 & 10 Vic. c. 93, is said to have impliedly stated that there was no remedy in damages to a wife, or child, or master, for a person killed, before that act was passed.—Osborn *v* Gillett, L. R., 8 Exch. 88. The old remedy of an appeal of death was, however, probably somewhat equivalent to the modern process, for the wife and heir of a person killed could sue out this appeal. It is left somewhat obscure what was the precise effect of that remedy, when it was competent.—*Hawk. P. C.* b. ii. c. 23 ; Bigby *v* Kennedy, 5 Burr. 2643 ; Mirror, c. 2, § 7.

The peculiarity of the English common law, which allowed an action for personal injury when the person was not killed but only injured, and no action when he was killed, was not known in the old Welsh laws, for it was provided by the codes of the 10th and 12th centuries, that if a married man was killed by negligence, compensation should be paid, and one-third of it should go to the widow.—*Dimet. Code ; Gwent. Code*, b. ii. c. 29. Indeed all barbarous codes ordered compensation to the family of the slain person, whether he was killed by accident or by murder.—See *post*, ch. iv.

ground of action being precisely the same, whether the result of that negligence was a trifling bodily injury, or ended in pain and death, the whole difficulty which the law has to overcome lies in defining what is the nature of that negligence, if any. And this can only be satisfactorily shown by enumerating with some detail, the leading situations and mutual relations of life and business, in which care and attention are required by the law, and the absence of which is the negligence on which such liability rests.

Who can sue for the negligent killing.—The statute of 9 & 10 Vic. c. 93, does not give the right of action to the executors, as such executors in their own right, of the person killed by negligence, and for the benefit so to speak of the estate of the deceased, but only in those cases where the party killed had some near relatives surviving him. These relatives are a husband, wife, parent, grandparent, step-parent, a child, and grandchild or step-child.[1] Where none of such relatives survive, where he is a friendless man, then the old maxim still applies, that the right of personal action dies with the person injured; and nothing more is heard of either the author or victim of the blame.[2]

Within what time action for negligent killing to be brought.—There are some other peculiarities attached to an action of damages for negligent injuries causing death, and these are also created by statute. The action can only be commenced within twelve calendar months after the death of the injured person.[3] And if the action is not commenced within six months, by the executor or adminstrator who has the right in the first instance to sue for the benefit of the relatives, then an action may be commenced by one or more of the persons beneficially interested, that is, the immediate relatives above named.[4] The jury also have it in their power to specify or apportion the damages proper to each of the relatives respectively; though if the defendant pay

[1] 9 & 10 Vic. c. 93, § 8.

[2] The word "child" in this statute means legitimate child, for a bastard is not a child in the eye of the law.—Dickenson *v* S. E. R. Co., 2 H. & C. 735.

[3] 9 & 10 Vic. c. 93, § 3. [4] 9 & 10 Vic. c. 93, § 2; 27 & 28 Vic. c. 95, § 1.

money into court before verdict, it will suffice that he pay one lump sum to cover the claims of all the relatives interested.[1]

Compensation for negligent killing.—Much difficulty at first arose as to defining how this kind of damage was to be estimated. The statute gives no further clue to what is meant by "the damages" authorised to be recovered than by simply calling them "damages such as the jury may think proportioned to the injury resulting from the death to the surviving relatives."[2] This is a vague expression, and opens a field for conjecture, but it is the business of courts of law to define and make precise what a statute often leaves indefinite. The death contemplated in this statute obviously means sudden or premature death, and on this ground, in applying the statute, the courts have refused to allow the jury to add a separate sum for funeral expenses and mourning, as these are not specially due to the suddenness of death,[3] but are rather incident to the death of each and all, whenever that death may happen. And in working out this liability it has also been found, that a master cannot bring an action for the negligent killing of his son who was merely his servant, for the benefit lost must arise through relationship and not through contract, and if no loss was due to the relationship as such, none due to the contract could be taken into account.[4]

How compensation estimated.—Again, though this mortal injury has the effect of causing sudden loss of companionship and many comforts to relatives, yet as these cannot always be estimated in money, they are not deemed to be contemplated by the legislature. Everything must be brought to the test of pecuniary value, and what may be called sentimental losses, due to anguish springing out of affection towards the deceased, cannot be made good in the form of damages under this statute, or indeed in any other form of remedy known to the law.[5] And where the life of the deceased was insured, and so a sum is due under a collateral contract with an insurance office, this sum has

[1] 9 & 10 Vic. c. 93 § 2; 27 & 28 Vic. c. 95 § 2. [2] 9 & 10 Vic. c. 93 § 2. [3] Dalton v S. E. R. Co., 4 C. B., N. S. 296. [4] Sykes v N. E. R. Co., 44 L. J., C. P. 191. [5] Blake v Midland R. Co., 18 Q. B. 93; Duckworth v Johnson, 4 H & N. 653.

nothing to do with the liability for negligent killing, and cannot influence the jury in fixing the amount of their verdict.[1]

The amount of compensation, which the jury may legitimately estimate, is however not restricted to a consideration of such loss as is measured solely by the legal liability which the person killed may have been under to maintain the relatives interested. Thus if the deceased was in the habit, out of mere liberality, of aiding in the support of his parent or any of the other relatives, his death will be deemed as good a ground of claim on that head, as if such support had been a compulsory maintenance. Hence the loss of a reasonable expectation of pecuniary advantage, is included in the estimate of compensation.[2] And such was held to be the case, where a young man, who had been for some years in the habit of making presents to his parents of a definite value, such as 20*l.* per annum, was killed, and the jury were held rightly to award compensation to the parent for the loss of that yearly sum. And the actual income of the deceased is always the main ground of calculation; but even that is not the only standard of damage, for if the deceased had a reasonable expectation of increasing such income, then this increment also may be taken into consideration and added to the actual income.[3] Thus, though there is no legal obligation on a parent to support a child, to an extent beyond the mere necessaries of life, that is to say, little beyond the *minimum* administered in a workhouse, yet the damage resulting to the children is not measured by this *minimum* standard. It is measured by the station of life of the deceased, and the advantages of education, and superior maintenance, and reasonable provisions by will, which usually accompany such station and the income actually enjoyed; so that, when these cease prematurely with the parent's life, the relative's loss is measured on a larger scale. Accordingly, where a parent, who had a life estate of 4,000*l.* a year, was killed before he had made any will, and leaving a widow and eight children, it was held

1 Bradburn *v* G. W. R. Co., 44 L. J. Exch. 9. 2 Dalton *v* S. E. R. Co., 4 C. B., N. S. 296: Franklin *v* S. E. R. Co., 3 H. & N. 211.
3 Ibid.; Pym *v* G. N. R. Co., 4 B. & S. 396.

that the jury rightly awarded her 1,000*l.*, and each of the children 1,000*l.*[1]

Rules for ascertaining where negligence exists.—Though the statute of 1847, already referred to, gave an impetus to the remedy for negligent killing, it did not profess to introduce any new rule of viewing the circumstances and estimating the degree in which the negligence, which is the basis of the action, exists. The old rule on that point remained unaffected, and the same negligence, which is a cause of action if the injury be slight and not mortal, is equally the cause of action and redress if the injury be mortal, and in defining more exactly this kind of remedy, a few subsidiary rules are commonly deemed settled.

The person injured or killed must not have been himself negligent.—One rule, by which this class of remedies is qualified, is, that the negligence of the defendant must be the sole, or all but the sole, cause of the accident, and nothing in the conduct of the deceased or injured person must have been a proximate cause of it, or, as it is called, a contributory cause; for if it were once allowed for courts and juries to enter into nice inquiries as to how much or how little of the joint result was attributable to the conduct of each of two persons, the injurer and the injured, there would be no end to the inquiry, and it never could be solved satisfactorily. Hence it is said that the cause of this kind of action must be due wholly to the negligence of the defendant. Accordingly, if the deceased has himself been negligent, and such negligence is a proximate cause of the accident, then there will be a complete defence, since it cannot then be said that his death or injury was caused by the mere wrongful act of another.[2]

The character of the negligence of deceased as regards its being a proximate cause of death is important in all those cases where some negligence is set up against the deceased, and it is desired to know when that is deemed a bar to redress. It is not enough to show that the plaintiff, or the person killed, was guilty of some negligence, unless such negligence was one of the proximate causes of the

[1] Pym *v* G. N. R. Co., 2 B. & S. 759; 4 B. & S. 396. [2] Butterfield *v* Forrester, 11 East, 60; Powell *v* Gen. Steam Co., 5 E. & B. 195; Witherby *v* Regent's Canal, 12 C. B., N. S. 2.

accident, for the prior negligence may have had nothing to do with what followed. Thus if a man were to be found sleeping on a highway, and the driver of a vehicle coming up might have avoided the sleeper, but kept to his side of the road and ran over him, this would be as much a cause of action as if the plaintiff had committed no negligence at all; in other words, the plaintiff's negligence is too remote to be considered in the question.[1] And the true rule to be left to a jury in such cases as this is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened.[2]

Contributory negligence in the case of coaches racing.— This doctrine of contributory negligence has been carried to an extent somewhat remarkable in cases of collision of carriages and ships, and a derivative or constructive negligence of the driver or pilot, imputed to a passenger, which in no sense resulted from anything the plaintiff did or could do in his own person relating to the matter. Thus where two coaches are racing, and the respective drivers are each guilty of negligence, it has been held, that a passenger on the A coach will be estopped from recovering damages for negligence of the B coachman who upset the A coach. The reason of this apparently anomalous doctrine is said to be, that, as each passenger has trusted his own driver by riding in his coach, he has so identified himself with his own driver that the latter's negligence is deemed his own. At least there is no reason why he should be in a better position than his driver; and hence no damages are recoverable against the opposite driver. His only remedy in such a case is to recover damages from his own

[1] Davis v Mann, 10 M. & W. 546; Radley v L. & N. W. R. Co., 44 L. J., Exch. 73; Greenland v Chaplin, 5 Exch. 248. The first of these cases was that of a donkey lying on the road, but precisely the same principle of liability applies between man and man in cases of negligent killing or injuring.

[2] Tuff v Warman, 5 C. B., N. S. 585; Walton v L. & Brighton R. Co., H. & R. 424.

driver.[1] In short, by his own act and contract he has converted himself into something as helpless, as if he were only a bale of goods in the driver's custody. And for a somewhat similar reason it has been held, that, if a nurse or other temporary guardian is carrying or leading a child of tender years, and by the nurse's negligence in part, combined with the negligence of the railway company or carrier, the child is injured, the infant cannot recover damages in its own right, because it is deemed to have been so identified with its nurse that the nurse's negligence is imputed to the child and forms a bar to any such remedy.[2] The reason given for this decision is that as the child is little else but a chattel, the contract is necessarily made with the nurse, and one of its conditions is that the nurse shall take care of the child. Hence, on this condition being broken, the nurse alone is to blame, and neither nurse nor child can recover damages.

Negligence implies a want of wilful intention.—While negligence is distinguished from mere accident on the one hand, it is distinguished from wilfulness and intentional injury on the other. When it is said that negligence is the legal cause of injury or pain to the body, it is not meant that the negligent person should have distinctly intended the injury which results. It is rather the contrary, for negligence consists in the absence of a specific intention to injure, but in the presence of a reckless or careless disposition as to whether the act was likely to do injury or not, or at least in the absence of a general knowledge such as a reasonable person would have that the act was dangerous, and yet where no precaution to guard against that danger was taken. Thus where a man in the train bands used his gun so carelessly that it went off and injured a comrade, the action was maintainable.[3] And one judge laid down the rule that no man is excused of a trespass, unless it is judged utterly without his fault.[4] Some carelessness is thus always an ingredient of the action, though it is often loosely stated, that a man may be liable for an accident or misfortune. Such a statement

[1] Thorogood *v* Bryan, 8 C. B. 115; Armstrong *v* Lancashire R. Co., 44 L. J. Exch. 89. [2] Waite *v* N. E. R. Co., E. B. E. 719. [3] Underwood *v* Hewson, 1 Str. 596; Weaver *v* Ward, Hob. 134. [4] Hob. 134.

must be always guarded with the qualification, that there must be some carelessness mixed up with such accident or misfortune in order to found an action against him who displayed it. Hence it has been found impossible to sustain any action, for example, where a horse is frightened by a sudden noise or clap of thunder and runs down some person; because this is an event which no care can guard against.[1] So where a sudden flood sweeps away part of a railway, and passengers are injured, the railway company are not liable.[2] And where a man, while repairing it, suddenly falls through the roof of a railway station and causes injury to a passenger below, the railway company is not liable to the passenger, for such an accident could not be helped.[3]

On the other hand, though it is often difficult to define the ingredient of negligence, this much is clear, that the act done always implies a knowledge, or an unreasonable want of knowledge, that such act may injure others, coupled with omission to guard against such mischief by any reasonable means. Thus negligence is easily inferred from such conduct as the following:—To tell a child to fetch or do something to a loaded gun:[4] to allow a man to carry an explosive substance without some warning what it is, for there is an implied duty in such case to give such notice:[5] to spur a horse while people are standing near:[6] to leave a horse and cart unattended in the street where children are playing about,[7] and yet children's curiosity and tendency to incur danger are not to be used as a handle to found liability when the fault is the child's alone, and nobody else is to blame.[8] And where the keeper of baths and washhouses has a dangerous machine, of which no warning was given to a customer using it, such keeper is liable.[9]

A chain of accidents from negligence.—Another difficulty

[1] Wakeman v Robinson, 1 Bing. 213; 8 Moore, 63; Hammack v White, 11 C. B., N. S. 588; Holmes v Mather, 44 L. J., Exch. 176. [2] Withers v North Kent R. Co., 27 L. J., Exch. 417. [3] Welfare v London & Brighton R. Co., L. R., 4 Q. B. 693. [4] Dixon v Bell, 5 M. & S. 198. [5] Farrant v Barnes, 11 C. B., N. S. 553; Brass v Maitland, 6 E. & B. 470. [6] North v Smith, 10 C. B., N. S. 572. [7] Lynch v Nurdin, 1 Q. B. 38. [8] Mangan v Atterton, L. R. 1, Exch. 239; Witherby v Regent's Canal Co., 12 C. B., N. S. 2. [9] Cowley v Sunderland, 6 H. & N. 565.

still arises, where there is a chain of causes, and it is necessary to define where the line is to be drawn, in order to fix the liability, for the *causa causans* is to be distinguished from the *causa sine quâ non*. The law acts on the maxim that it is the proximate cause, which is looked to as a ground of liability, and injuries arising out of ulterior circumstances are deemed not attributable in the eye of the law to the wrongful act, but rather to the chances of life. And indeed if remote antecedents were inquired into, the inquiries would be endless and objectless. It is impossible, however, to state this as a universal rule, since there are cases where the original cause continues to be the dominant cause all through a variety of intermediate events. Thus, if the negligence of the driver of a coach causes the horses to run away, and a passenger, reasonably apprehending danger, jump off to save his life, and thereby break his leg, the first negligence is deemed the dominant cause of this broken leg.[1] If a person throw a squib into a crowd, and first one and then another in self-defence catches it and throws it off, till at last it puts out a man's eye, the latter is entitled to an action against the first thrower, as if it had been aimed at him from the first, or at least, as if the intervening acts of others had merely given the missile a course somewhat more circuitous.[2] And hence this was deemed an instance of "trespass" rather than of "case," when those distinctions were deemed of consequence. The case of the squib may be treated as one of a series of mechanical changes only in the direction of the squib. In other cases it may be difficult to trace the first cause so steadily, when the voluntary action of third parties intervenes, or unexpected incidents arise; and the true limit to the rule seems to be, that those consequences only will be deemed to flow from the act which in the ordinary course of events are known by all intelligent men so to flow. Thus, when the negligence of a railway company caused a family to walk home some miles during a wet night, and the mother of young children caught cold, this cold was deemed too remote and unusual a consequence to be taken into account as arising from the negligent act.[3]

[1] Jones *v* Boyce, 1 Stark. 493. [2] Scott *v* Shepherd, 2 W. Bl. 892; 3 Wils. 403. [3] Hobbs *v* L. & N. W. R. Co., 44 L. J., Q. B. 49.

When negligence is self-evident and is presumed.—And there are some circumstances which are so pregnant with negligence, that they are deemed of themselves without any further knowledge of the surrounding facts to be *primâ facie* evidence of such negligence. As to these the maxim is, *res ipsa loquitur*, and the plaintiff need give no further evidence than this fact, for it lies on the defendants to explain it away. Thus it is, when there is a collision between two trains of the same railway company; as some negligence must have been due to one or both of their sets of servants, the company is held *primâ facie* negligent.[1] So it is, where a sack falls from a top window of a flour-dealer's premises into the street or highway;[2] or a brick falls out of a railway bridge on the highway;[3] or a passenger's eye is struck by the driver's whip;[4] or a horse kicks through the carriage which it is drawing.[5] And the breaking down of a coach, owing to a defective axle-tree, which might have been discovered by inspection, has been treated as *primâ facie* negligence.[6] The mere happening of an accident, however, may be said to be more usually not sufficient *primâ facie* evidence of negligence than the contrary; and one can seldom with safety judge of it without knowing the surrounding facts.[7]

Negligence is always a question of fact and circumstances.—It is thus manifest that negligence on the part of the wrongdoer is always a question of circumstances, and can only be decided by reference to the situation in which such wrongdoer was at the time; and the degree of care, or want of care, is also to be estimated accordingly. Innumerable occasions occur for two persons coming into collision in some form or another, and whether one is to blame or not at any particular moment, can only be traced out by inquiring what he was doing at the time, whether he was engaged in his own lawful business, and whether, while so engaged, he was sufficiently mindful of the business of others.

[1] Skinner *v* L. & Brighton R. Co., 5 Exch. 787. [2] Byrne *v* Boodle, 2 H. & C. 722; Scott *v* London Docks, 3 H. & C. 596; Briggs *v* Oliver, 4 H. & C. 403. [3] Kearney *v* L. B. & S. C. R. Co., L. R., 5 Q. B. 411; L. R., 6 Q. B. 759. [4] Ward *v* Gen. Omnibus Co., 42 L. J., C. P. 265. [5] Simpson *v* Omnibus Co., 42 L. J., C. P. 112. [6] Sharp *v* Grey, 9 Bing. 457. [7] Hammack *v* White, 11 C. B., N. S. 588.

Classification of circumstances displaying negligence.—As the business of life is infinite, and negligence is thus always a relative term, no rule can be laid down for the infallible discovery of what is or what is not negligence in each case. Nevertheless there are some well-known classes of circumstances, out of which danger to life usually arises, and as to these some subsidiary rules of viewing facts have been arrived at, which amount almost to rules of law.

Negligent carriage of passengers by railway.—In considering railway accidents causing injury to life, as a fruitful source of actions, it must be recollected, that the usual contract of a carrier is, not to carry the passenger safely at all hazards, or to insure his safe arrival, or to insure that the carriage is free from latent defects; but it is merely to use due care and diligence in conveying him in a carriage reasonably believed to be sound; and in this, as in all other cases, inevitable accidents may occur, which imply no negligence on the part of the carrier.

Railway accidents when implying negligence.—It is sometimes said that the mere fact of a railway accident having occurred, when nothing more is known about its cause, is *primâ facie* evidence of negligence on the part of the railway company; but this is only true when the known circumstances reasonably exclude any other cause.[1] For an accident may be due to some latent fault in a wheel, implying no negligence whatever in any person, since no care can prevent or discover such a fault.[2] And this is a rule which applies also to the maker of goods, intended to be used for a particular purpose, but somehow failing to accomplish that purpose.[3] Or the accident may be caused by some wilful or malicious act, or some negligence of a stranger or third party, for whom the company cannot be made answerable.[4] Hence also, where a child strayed upon a railway and was killed, but no one could tell how the child got there, there was no *primâ facie* liability to be

[1] Skinner *v* L. & B. R. Co., 5 Exch. 787; Bird *v* G. N. R. Co., 28 L. J., Exch. 3. [2] Readhead *v* Midland R. Co., L. R., 2 Q. B. 412; 4 Q. B. 379. [3] Randall *v* Newson, 45 L. J., Q. B. 364. [4] Latch *v* Rumner R. Co., 27 L. J., Exch. 155; Daniel *v* Metrop. R. Co., L. R., 5 H. L., Ap. 45.

implied from the mere fact of the child being so killed.[1] And the mere fact that the railway company might have taken greater precautions to guard against a possible cause of accident, is very seldom to be treated as *primâ facie* negligence, for if so, inquiries into the comparison of opinions, which conflict on nearly every practical matter, would be endless and never satisfactory; as for example whether the metal facings of stairs are safer when made of brass or lead;[2] or whether an iron girder erected by third parties over the railway would fall down on passengers, if the latter were not specially protected.[3]

Sometimes also a person may take all the risk of injury on himself, in which case he has no remedy, for the ordinary rule will, by his own express contract, have no application; and though the court will be slow to presume such a contract, it is sometimes made out very clearly.[4] And if the passenger has taken on himself the risk of the travelling, this will include also the risk of coming to and going out of the railway station.[5] And for a like reason, if a workman be taken gratuitously in a carriage of the person for whom, and to the place at which, he is to work for that person, and owing to an accident to such carriage he is injured, the driver is not liable, for such workman is merely on the footing of a guest who shares all risks with the host.[6]

Courts have often to decide if there is any evidence of negligence.—The duty is often cast on courts to say, whether the circumstances, under which a railway accident happened, show any evidence to go to a jury of negligence on the part of the company. On such occasions the court brings to bear on the business of life the same experience and the same estimate of conduct as juries do, except that, whenever it becomes manifest that there is some evidence to go to a jury about which reasonable minds may differ, then the court will itself seldom undertake to say whether that evidence ought to lead to one conclusion rather than another, for a jury is the proper tribunal to weigh and cast up and declare

[1] Singleton *v* Eastern Co. R. Co., 7 C. B., N. S. 287. [2] Crafter *v* Metrop. Co., L. R., 1 C. P. 300. [3] Daniel *v* Metrop. R. Co., 40 L. J. (H. L.), C. P. 121. [4] Gallin *v* L. & N. W. R. Co., L. R., 10 Q. B. 212; Hall *v* N. E. R. Co., L. R., 10 Q. B. 437. [5] Ibid. [6] Moffatt *v* Bateman, L. R., 3 Priv. C. 115.

on which side the balance turns. Thus if a train has arrived at a station—when and under what circumstances the passenger is justified in getting out—whether he has acted thoughtlessly or hastily, without waiting till the train has come to a stand—whether on hearing the name of the station called out, he is justified in assuming that he may get out—whether in stumbling in a dark passage, sufficient care has been taken to light it—all such speculations give rise to numerous questions, which however are chiefly questions of fact as to which no clear rule can be laid down, and it would be idle to attempt it.[1] And in like manner when people cross a railway at a place where the highway is on a level, and there is no local watchman, the degree of care on the part of the passenger must be proportioned to the situation; and while he is bound to look out lest contrary trains be approaching, some weight will be due to the fact whether the company have used sufficient guide-posts and precautions as a fair protection to passengers.[2] And it has been also laid down as a subsidiary rule, that, if one person by a negligent breach of duty expose another person, towards whom the duty is contracted, to obvious peril or to grave inconvenience, though this last may be the immediate cause of the injury, it is not less to be regarded as due to the wrongful act of the wrongdoer.[3]

Statutory requirements in further protection against railway dangers.—Though the common law thus protects human life against many accidents arising out of the use of railways, still this has been deemed by the legislature insufficient; and some additional requirements and penalties have been created by statute towards the same end. Many of the details of railway management have indeed been framed

[1] Siner *v* G. W. R. Co., L. R, 3 Exch. 50; 4 Exch. 117; Cockle *v* L. & S. E. R. Co., L. R., 5. C. P. 457; Robson *v* N. E. R. Co., L. R. 10 Q. B. 271; Bridges *v* N. L. R. Co., L. R., 6 Q. B. 377; 43 L. J. (H. L.), Q. B. 151; Weller *v* L. & B. R. Co., 43 L. J., C. P. 137.
[2] Stubley *v* L. & N. W. R. Co., L. R., 1 Exch. 13; Skelton *v* L. & N. W. R. Co., L. R., 2 C. P. 631; Stapley *v* L. B. & S. Co., L. R., 1 Exch. 21; Bilbee *v* L. B. & S. Co., 18 C. B., N. S. 584; Wanless *v* N. E. R. Co., L. R., 6 Q. B. 481; 43 L. J., H. L., Q. B. 185; Ellis *v* G. W. R. Co., 43 L. J. (Exch. Ch.), C. P. 304. [3] Jones *v* Boyce, 1 Stark. 493; Adams *v* Lanc. & Y. R. Co., L. R., 4 C. P. 744; Gee *v* Metrop. R. Co., L. R., 8 Q. B. 173; Robson *v* N. E. R. Co., L. R., 10 Q. B. 272.

more or less for this one object—to lessen the danger to human life; but the present subject requires only a notice of a few special injunctions which bear directly on this one point. In order to secure the public against the increased danger to human life from railways crossing highways on a level, the Railways Clauses Act imposed the duty on railway companies to keep a gate across each side of the railway sufficient to exclude cattle and horses at that spot, and to keep a proper person to open and shut such gates.[1] Under this enactment, as the duty to have a person always at hand to open gates can be enforced, if a passenger himself open the gates without the leave or presence of the company's servant, he usually takes the risk of the passage on himself.[2] And to enhance the safety of passengers, each railway company is bound in certain cases to provide means of communication between the passengers and guard.[3] To throw maliciously and unlawfully any stones or other matters at railway carriages, with intent to injure or endanger the safety of any person in the carriages, is felony; while children under sixteen may be punished in a summary manner for like misconduct.[4] And to put stones or things on railways likely to upset carriages is also a like offence.[5]

Driving negligently and furiously on highways.—The instances of negligence and consequent injury to passengers using a railway belong to one form only of using a particular conveyance. In driving ordinary conveyances in the highway there is found another illustration of the same fundamental rule, which rule is this, that each person must take care not to injure another by driving against him; and the right side of the road is assumed to be common knowledge to all men. The circumstances must always be the main guide, should occasion arise to judge whether due care was exercised. When a driver is guilty of a negligent injury, this arises usually from his being too intent on his own business to give due attention to the business of others. It is owing to this being so

[1] 8 & 9 Vic. c. 20, § 47. [2] Wyatt *v* G. W. R. Co., 6 B. & S. 709. [3] 31 & 32 Vic. c. 119, § 22; Blamires *v* Lancaster R. Co., 42 L. J., Exch. 182. [4] 24 & 25 Vic. c. 100, § 33; 27 & 28 Vic. c. 47; 34 & 35 Vic. c. 78, § 13. [5] 24 & 25 Vic. c. 97, § 35; 27 & 28 Vic. c. 47; 34 & 35 Vic. c. 78, § 13.

common a case and being carried so far, that the legislature has been driven to constitute furious driving a distinct offence, as it is so apt to end in serious and irreparable injuries to bystanders and passengers. Hale said killing by furious driving was a kind of manslaughter, for though there is an absence of malice, yet the recklessness and want of care are very conspicuous. While, therefore, the numerous accidents that arise in the course of driving carriages on a highway give rise most frequently only to actions for damages, yet where some flagrant recklessness of the driver occasions injuries, this is properly treated as a criminal offence, seeing that every use of a highway entails as a consequence a reasonable care for the lives and properties of others, who may with equal rights be using the same highway at the same time.

Accordingly it is enacted that whosoever, having the charge of any carriage or vehicle, shall by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanour; and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years with or without hard labour.[1] And if the driver or rider shall by negligence or wilful misbehaviour cause hurt or damage to any person, or ride furiously, so as to endanger life or limb of passenger, he shall, in addition to any civil action, be fined five pounds.[2]

Negligence in carrying passengers in ships.—As passengers in a railway or land conveyance have a remedy for carelessness in driving which leads to personal injury, so those in ships have similar remedies. But the peculiar situation of a passenger of a ship somewhat varies the rules of law, which usually guard others from danger. As ships require a pilot in certain places, and the captains are compelled by law to employ one, it is reasonable that when the ship is under the pilot's charge, and such pilot is negligent, and thereby causes injury to a passenger, the owner of the ship should be exempted from all responsibility to such passenger, unless where some of the ship's crew, in their respective departments, were also negligent,

[1] 24 & 25 Vic. c. 100, § 35. [2] 5 & 6 Wil. IV. c. 50, § 78.—Furious riding is here included also; Williams *v* Evans, 40 J. P., 358.

and jointly contributed to the injury.[1] The pilot is not deemed a fellow-servant of the crew; and hence, if he is himself injured by the negligence of the crew, he can sue the owners for negligence.[2] Where a passenger is in a ship which comes into collision with another ship, and there is negligence on board of both, the passenger cannot sue the owners of the other vessel, but must confine his remedy to the owner of his own vessel, the rule being the same as in case of rival coaches racing.[3] And when numbers of passengers are injured, and they themselves, or their representatives, claim damages, the liability of the owners is subject to some limits.[4] Moreover, a great body of regulations is contained in the Merchant Shipping Acts, the beginning and end of which is nothing else but the ultimate security of human life, to which is added also some regard to the safety of property. But as these are remote from the immediate object of personal security of the individual passenger, a more detailed account of such regulations belongs properly to another division of the law, entitled "The Security of Contract."

Risk of inviting persons to enter premises.—Persons entering premises and receiving injury are sometimes entitled to redress. Here a distinction arises between guests and business visitors. It is the duty of the occupier of private premises, to which the public are invited to resort, or to which they may resort on lawful business or pleasure, to keep such premises in a state of repair sufficient to prevent injury being received. But a clear distinction must be made between trespassers, or mere licensees, or guests, or servants of the occupier on the one hand, and those who go upon the premises by invitation in course of business that concerns such occupier on the other hand. In the former case the trespasser, or guest, or servant, is supposed to take care of himself, and run all risks of the place; in the latter case the occupier is bound to take care of the business visitor and caution him of every danger not patent to the senses.[5] A person also who is allowed to take a short cut through dangerous

[1] 17 & 18 Vic. c. 104, § 388; The Iona, L. R., 1 P. C. 426; The Calabar, L. R., 2 P. C. 238. [2] Smith *v* Steele, 44 L. J., Q. B. 60. [3] See ante p. 253. [4] 17 & 18 Vic. c. 104, § 514. [5] Southcote *v* Stanley, 1 H. & N. 247.

premises, the danger of which is visible, has no remedy if he is injured by that danger, for he is in the class of licensees, and shares the same risks as guests and servants.[1] When, however, one goes upon another's premises by invitation in course of the business of the occupier, the latter is deemed bound by law to take reasonable care, that the invited party shall not fall into a trap or a dangerous place without being warned. Thus it is with a gasfitter ordered to do repairs in a sugar refinery and falling through a shaft.[2] So where a passenger enters a railway station or ship to start on a journey, and falls through a trap-door.[3] And so where a railway guard, looking out of the window, has his head shattered by a bridge made inconveniently narrow, on a railway which his company lawfully use.[4]

Negligence in keeping of premises near highway.—Another class of cases in which negligence is implied or easily presumed is where property adjoining a highway is in a state of dangerous disrepair, which gives rise to an injury to a passenger. This is founded on the principle that all persons, who have premises adjoining a highway, are bound in some way to protect these premises, so that those who are lawfully passing along the highway may not fall into a trap. The object of the rule is to secure the public right of passage along such highways, so that in pursuit of their occupations people may not be suddenly interrupted by some cause against which ordinary care cannot guard them. Such a rule may be considered first as regards land and rural situations; and secondly as regards occupiers of houses in streets and crowded places, the latter state of facts being somewhat more complicated, though the principle is not different.

Negligence near highways in rural places.—Where a highway is on a level with the adjoining lands, though there is no obligation on the owner to fence the side of the highway, yet whenever there is any excavation adjacent to the highway artificially made, whether in the form of a ditch or a pit, then the duty arises on the owner to fence this excavation. The reason is, that the public have a right

[1] Bolch *v* Smith, 7 H. & N. 736; Wilkinson *v* Fairrie, 1 H. & C. 633.
[2] Indermaur *v* Dames, L. R., 1 C. P. 274; 2 C. P. 311. [3] John *v* Bacon, L. R., 5 C. P. 437; Pickard *v* Smith, 10 C. B., N. S. 470.
[4] Graham *v* N. E. R. Co., 18 C. B., N. S. 229.

to pass along the highway at all hours of the day and night, and that, whether they are blind or lame, are careful or less careful; so that, unless the adjacent land be in such state that they can use the highway without the risk of stumbling and injuring themselves, such user would only become a snare to them. But this obligation of the owner of the adjacent land extends no further than the side of the highway, so that when the excavation is some distance from the highway, this obligation ceases to govern him. Thus if a passenger lawfully using the highway fall into an excavation substantially adjoining, and which is not fenced, he may sue the occupier of such land; whereas if he had strayed from the highway and become a trespasser, and then fallen into a pit at some distance, he would have no similar remedy, for it is impossible to undertake the care of trespassers.[1] And the question is thus often brought round to this, what is meant by an excavation "substantially adjoining" the highway; and this is a question of law and partly of fact, which the judge or court can decide for itself.[2] And because passengers so often stray at a distance from highways, and suffer damage which has no redress for the above reasons, the foresight of the legislature has been shown in making it a punishable offence for the owners of abandoned mines not to fence securely old shafts, which are the frequent cause of death to unsuspecting trespassers and travellers.[3]

Negligence in premises adjoining streets.—The safety of passengers in streets and crowded places is still more exacting on adjoining occupiers, owing to the greater variety of dangers. The civil law indeed made the occupier of a house responsible for damage caused to passengers by anything thrown out of the upper part of the house by an inmate, though the occupier had no knowledge or concern in it.[4] But we are more critical and discriminating, and require to know somewhat more of the circumstances, before we attach so sweeping a liability to any

[1] Hardcastle v S. Yorkshire R. Co., 4 H. & N. 67; Barnes v. Ward, 9 C. B. 392; Hounsell v Smith, 7 C. B., N. S. 731. [2] Binks v S. Yorkshire R. Co., 3 B. & S. 244. In that case 14 feet intervened, and the court held that the excavation did not "substantially adjoin."

[3] 35 & 36 Vic. c. 76, § 42; 35 & 36 Vic. c. 77, § 13. [4] Pand., b. 9, 413; Just. Inst. 4, 5, 1; dejecti effusive actio.

man; and indeed, the ancients having no juries to solve every complication of negligence, their courts were obliged to lay down hard and fast lines of evidence which do not bear examination in modern times. In our law a case occurred where a ladder used in an upper story slipped and broke the window, and a piece of glass fell and hit a man employed in the street below, and the court held that there was no *primâ facie* evidence of negligence.[1] Nevertheless those occupiers of houses and premises adjoining a street are very strictly looked after, and bound by the law to take positive precautions against the likelihood of danger to passers-by from anything met with upon and connected with the premises. Shutters and swing-doors and cellar-flaps must be secured or safely bolted, and chimney-pots firmly fixed. Thus where a barrel of flour falls from an upper window of a store, this is deemed *primâ facie* due to some act of negligence in the occupier or his servants, and unless clearly explained away, and the responsibility shifted to some other shoulders, will inevitably bring home liability to the occupier.[2] And even where a cellar door was so loosely fastened that children were naturally tempted to play with and upset it, and so bring injury on strangers passing, the occupier has been held liable for this thoughtless but childish act.[3] And so where a lamp projecting from a house fell on a passenger owing to some negligence in the person, however competent, who last repaired it, the occupier of the premises was held liable.[4] And a new occupier coming to premises adjoining a street does not escape liability by saying, that he has merely used the premises as he found them, for the liability is in some sense indelible, being imposed on the occupier for the time being for the protection of the public passing by, and to whose safety changes in ownership and occupation are altogether irrelevant.[5] And even a tenant at will is subject to the same liability.[6] And the nominal tenant is liable, though he has not yet entered, but has merely left the premises in the hands of a builder

[1] Higgs *v* Meynard, H. & R., 581. [2] Byrne *v* Boodle, 2 H. & C., 722. [3] Daniels *v* Potter, 4 C. & P. 262. [4] Tarry *v* Ashton, 45 L. J., Q. B. 260. [5] Barnes *v* Ward, 9 C. B. 420; Coupland *v* Hardingham, 3 Camp. 398; Pickard *v* Smith, 10 C. B., N. S. 470. [6] R. *v* Watts, 1 Salk. 357.

to finish.[1] But if the landlord and not the occupier of premises has contracted to do the repairs, he will often be the person liable for a defective grating by which a passenger is injured.[2] And in such cases a nuisance or active negligence is to be distinguished from a mere projection or an apparent encroachment on the highway, such as doorsteps above the level of the street; for these may be no part of the highway at all, though owing to their position incidentally a source of danger to those using it.[3] And for a like reason, though a ditch run alongside a highway and be dangerous in the dark, there may be no obligation on anybody to fence off that ditch.[4]

Negligent acts on highways.—And with the same object in view, namely, the safety of passengers, the legislature has supplemented the deficiencies of the common law by enacting, that no persons shall sink a pit or shaft, or erect a steam-engine within twenty-five yards, nor erect a windmill within fifty yards, of a highway, unless these things are properly screened, so that they may not be dangerous to passengers, horses, and cattle.[5] Locomotive steam-engines are also subject to definite restrictions as to use for a like reason.[6] So laying timber, stone, or rubbish to the injury or personal danger of any person travelling is a penal offence.[7] And so is firing or throwing any fireworks on or into any highway or public place.[8]

Occupiers of private roads.—The liability of the occupier of a private road, to those who travel on it, is the same as if it was part of his premises; for if he invite persons to use it as a highway, or means of access to his house or ship, the duty lies upon him to make it reasonably safe.[9]

[1] Hadley v Taylor, L. R., 1 C. P. 53. [2] Gandy v Jubber, 9 B. & S. 389. [3] Fisher v Prowse, 2 B. & S. 770; Robbins v Jones, 15 C. B., N. S. 221. [4] Cornwall v Metrop. Sewers, 10 Exch. 771.

[5] 5 & 6 Wil. IV c. 50, § 70; 27 & 28 Vic. c. 75. The penalty is five pounds. Steam ploughing-machines are excepted subject to precautions; 28 & 29 Vic. c. 83, § 6; 34 & 35 Vic. c. 95. This enactment includes a portable steam-engine on wheels.—Smith v Stokes, 4 B. & S. 84.

[6] 24 & 25 Vic. c. 70, § 13; 28 & 29 Vic. c. 83. [7] 5 & 6 Wil. IV. c. 50, § 72. The penalty is forty shillings.

[8] 38 & 39 Vic. c. 17, § 80. The penalty is five pounds. To let off squibs, guns, or pistols within fifty feet of the centre of a highway, subjects to a penalty of forty shillings: 5 & 6 Wil. IV. c. 50, § 72.

[9] Corby v Hill, 4 C. B., N. S. 556; Smith v London Docks, L. R., 3 C. P. 326.

Negligence in not repairing highways.—Another source of personal injuries is the defective state of repair in the highways on which the public travel. And here again a distinction may be noticed with regard to accidents and dangers caused by the nonrepair of highways, that is to say, the mere passive neglect of the surveyor or local board, or of whoever has the power and duty to repair them. Inasmuch as the proper remedy for nonrepair of a highway is an indictment against the parish, the vigilance of all is said to be engaged in enforcing this remedy. Hence if, through the neglect to repair, a hole exists, which gives rise to an accident or injury, the sufferer is not entitled to hold the surveyor or local board personally liable. And no one indeed is so, when no personal negligence is mixed up with it; for the legislature has deemed the remedy by indictment sufficient to protect all against any such contingency and to keep the parish functionary up to his duty.[1] It is true that the wisdom of this rule is by no means self-evident, for if a parish can afford to bear the expense of repairing a highway, it might equally well afford to bear the expense of the usual risks, such as individuals in their own case incur of not repairing premises. But the only reason given by the courts for the rule is, that because the law has found what is assumed to be an appropriate machinery for keeping highways in repair, namely, an indictment, the parish ought not to be liable to anything resembling an action of negligence, for all are equally interested in enforcing the repairs. Hence, the parish by this reasoning not being liable, its servant, the surveyor, is also not liable, and nobody is liable; so that any person passing by chance, and breaking his leg, owing to the highway being in disrepair, has no remedy against

Statutory Occupiers.—Public commissioners or statutory trustees who occupy dangerous premises are liable, whatever be the mode of appropriating their income, in the same way as private occupiers, and have no larger or less liabilities in respect of accidents and dangers occurring on their premises or on highways which are vested in them.—Mersey Board *v* Gibbs, L. R., 1 H. L. C. 93; Coe *v* Wise, L. R., 1 Q. B. 711, and 5 B. & S. 440; Foreman *v* Canterbury, 41 L. J., Q B. 138.

[1] Young *v* Davis, 7 H. & N. 760; 2 H. & C. 197; Gibson *v* Mayor of Preston, L. R., 5 Q B. 218; Mackinnon *v* Penson, 8 Exch. 319; Parsons *v* St. Matthew's, L. R., 3 C. P. 62.

anyone. Notwithstanding this rule, however, if a grating or other part of a highway belongs in property to a local board or commissioners, who stand in a different position from the parish, then these are liable as if they were the owners of premises adjoining the highway, and such premises were not kept in proper repair.[1] And the surveyor may make himself liable for negligence during the repairs, if he act himself as the contractor, and is personally negligent.[2]

Negligence in keeping vicious dogs and animals.—Another usual source of danger to the person arises from the practice of keeping animals, wild and tame, but especially dogs. There is nothing deemed positively illegal in keeping any animal, and some of the domestic animals are almost part of many a common household. In such cases the law does not go the length of treating the animal as a kind of servant or agent of its owner, so as to make him responsible for its doings as if it and he were identical, and had one mind and purpose. The utmost length the law goes is to give a remedy for injuries done by the animal, when the owner has been guilty of any negligence in keeping it, and which negligence may fairly be deemed the cause of such injury. It is necessary however on this subject to make one or two distinctions, more especially as the popular idea as to responsibility differs widely from that which the law defines.

There is a distinction in the outset between wild or savage animals and those which are tame and mild in their general temper. The former are such as lions, bears, serpents, monkeys, though these are often capable of being tamed to a certain extent. The latter class includes all domestic animals, dogs, cats, and cattle. And the distinction consists in this, that in the former case a savage or mischievous temper is presumed to be known to their owner and to all men as a usual accompaniment of many wild animals; and hence a positive duty is cast on the owner to protect the public against the mischief resulting from such animal being at large. In the latter case no mischievous disposition is presumed; but if any peculiar tendency to mischief or injury is found to belong to the animal, and is made known to the owner as a fact, then a like positive duty is

[1] White *v* Hindley Local Board, 44 L. J., Q. B. 114. [2] Pendlebury *v* Greenhalgh, 45 L. J., Q. B., H. L. 3.

cast on him to guard the public against injury from this proclivity.

The general rule then is, that wild animals of a vicious disposition must be kept by the owner in such a place as not to allow them the opportunity of giving vent to their temper and injuring mankind; at least if he fail to do this, he must bear the entire risk. Indeed such risk may approach the risk of murder. If the owner wilfully let loose a wild beast, which kills a human being, he will be guilty of murder: if he negligently allow the beast to escape, he may in some cases be guilty of manslaughter. And if the animal do injury to mankind, an action will lie against the owner, and it is not necessary to prove that the owner knew of the injurious disposition of the beast, for that is common knowledge; nor that he kept it negligently, for whether he did so or not, he is assumed to take the risk.[1] In the action for injury caused by a savage or a wild animal, the ground therefore is, that the owner wrongfully kept the animal with knowledge of its propensity, and that it injured the plaintiff.[2] And it is not necessary to allege that it was kept negligently, it being at once presumed that he kept the animal at his own peril.

But where the injury is done by a tame animal, that is to say, one of a class which is not usually vicious, but which happens, notwithstanding, to have a vicious propensity known to its owner, and is kept negligently, the ground of liability is the same as in the wild and savage animals, except that the owner's knowledge of the vicious propensity having been acquired by such animal must be alleged and proved against him.[3] And when all that can be proved is, that a servant of the owner or member of his family was cognisant of the vicious propensity, then the owner will not be bound by his servant's or relative's knowledge, unless the latter had the charge of the dog, or such charge was fairly included in part of the servant's duties at the time.[4] This knowledge may, however, very well be inferred from the circumstance that the owner had

[1] Jenkins v Turner, 1 L. Raym 110. [2] May v Burdett, 9 Q. B. 101. [3] Ibid.; Cox v Burbridge, 13 C. B., N. S. 430. [4] Stiles v Cardiff Co., 33 L. J., Q. B. 310; Gladman v Johnson, 36 L. J., C. P. 153; Applebee v Percy, 43 L. J., C. P. 365; Baldwin v Casella, 41 L. J. Exch. 167.

warned persons against the dog,[1] or knew that it had before attempted to bite people.[2] And it is always a good defence that the dog does not belong to the occupier of the premises where the mischief was done, though it may have haunted such premises.[3]

But though the person injured by a dog has a remedy against the owner in the above circumstances, an exception exists where the person injured was a trespasser, or where the dog was kept in the owner's own premises during the night to protect them.[4] On the other hand, it is no ground of defence to an action for injury inflicted that the dog was kept in premises during the day if it was kept in such a position that it could attack a person who calls at the premises on lawful business, whether the business is that of the owner or of the visitor.[5] Nor does the owner escape liability for keeping a savage dog in such a situation by merely putting up a notice to "beware of the dog," if the visitor either did not see the dog or could not read; and it is always extremely difficult to prove special knowledge of this kind conveyed to the visitor.

Dangerous and mad dogs.—But the law is not satisfied with guarding mankind by compelling owners in some cases to pay damages. Even though a dog has not actually bitten or injured a human being, yet the legislature, in order still further to protect mankind against the probability of such attacks, has, in case of a dog which is dangerous and not kept under proper control, provided those facts have been brought to the notice of justices and of the owner, imposed on such owner a penalty of twenty shillings for every day he fails so to keep it under control.[6] Or if the owner has already so failed, the justices may in their discretion themselves order the dog to be

[1] Judge *v* Cox, 1 Stark. 285. [2] Worth *v* Gilling, L. R., 2 C. P. 1.

[3] Smith *v* Great Eastern R. Co., L. R., 2 C. P. 4. The necessity of knowledge in the owner of a domestic animal's vicious propensity as an ingredient in the right of action is dispensed with by statute in the case of dogs worrying sheep and cattle, 28 & 29 Vic. c. 60. (This belongs to title, "Security of Property;") but the rule continues in force as to injuries done to mankind.

[4] Brook *v* Copeland, 1 Esp. 302. [5] Larch *v* Blackburn, 4 C. & P. 300; M. & M. 505; Curtis *v* Mills, 5 C. & P. 489; Charlwood *v* Greig, 3 C. & K. 48. [6] 34 & 35 Vic. c. 56, § 2.

killed.[1] And when a mad dog is known to be at large, the justices, with a view to the same protection of mankind, may order all dogs in the neighbourhood to be during a limited period kept under close control by their owners, subject to a penalty of twenty shillings for disobedience of such order.[2] And in the metropolitan district, if any dog has been proved to have bitten or attempted to bite any person, the magistrate may, in his discretion, at once order such dog to be destroyed.[3] And in those towns subject to the Towns Police Act, every person who suffers any unmuzzled ferocious dog to be at large, or a dog suspected of madness, is subject to a penalty of forty shillings.[4]

This subject as to how best to deal with dogs biting mankind seems to have perplexed ancient legislators much. Solon, the wisest lawgiver of his time, enacted that if a dog bit a man, it was to be delivered up bound to a log of four cubits long; and Plutarch thought this an admirable and ingenious law. And the Romans in their Twelve Tables adopted the rule also.[5] Plato also thought it a wise law, that the owner of a horse or a dog should pay for the injuries done by it to a neighbour, and apparently negligence was no element in his view of the question.[6] But the wisdom of antiquity was wholly outdone by the Welsh legislator of the twelfth century, who provided that, after the dog had bitten three persons, it was to be tied to its master's leg and then killed.[7]

Injuries caused to third parties by servants.—When injury or death is caused by a servant of another, the liability attaches to the master in most of the cases of negligence, provided the act which caused the injury was done in the ordinary employment of the servant as such, and was not due to the servant's own wanton or malicious conduct.[8] It is however extremely difficult to draw distinctions between a servant's wilfulness or recklessness and his negligence, and the master generally suffers for both indiscriminately. Where, however, the distinction is brought out and established by evidence, the court will give effect

[1] Pickering v Marsh, 38 J. P. 678. [2] 34 & 35 Vic. c. 56, § 3. [3] 30 & 31 Vic. c. 134, § 18. [4] 10 & 11 Vic. c. 89, § 28. [5] Plut. Solon. [6] Plato, De Leg. b. 11. [7] Anc. L. Wales, Dimet. Code, b. 2, c. 14. [8] Laugher v Pointer, 5 B. & C. 554; Croft v Alison, 4 B. & Ald. 590; Seymour v Greenwood, 6 H. & N. 359.

to it by exempting the master in the former case from liability. Yet the mere fact that the master expressly directed the servant not to do such acts is not of much consequence, since it may be usually implied in the very relation of master and servant, that the master never engages or requires or authorises the servant to do wrongful acts to third parties.[1] In short, errors of judgment committed by a servant in the fair advancement of the master's service are at the risk of the master, and nice distinctions as to whether the servant was at the moment within the strict line of such service are not favoured by the law. For though it is obviously incorrect to say, that anything the servant takes it into his head to do, however well meant on his part, is for the benefit of the master's service so as to make the master responsible on account of it, yet in considering, whether a servant is at the time acting in the course of his employment or beyond it, a reasonable allowance is to be made for emergencies in which the servant acts on the spur of the moment for the supposed interest of the master, who in that case is equally liable.[2]

Negligence of a servant acting on his own account or for another master.—It sometimes happens, that the servant combines his own business with that of his master, and for example uses his master's horse for a service which is exclusively his own. In such a case the master will not be liable for injuries caused in driving his master's horse during this interval, provided always that the fact is clearly established, that it was the servant's own business in which he was at the time engaged, and it was wholly independent of the master's business, and was no mere error of judgment arising from a confused perception of his duty.[3]

The liability of a master for the injuries caused by his servant is not only taken away by the act being wilful and beyond the scope of the service, but also when the servant,

[1] Limpus *v* London Omnibus Co., 1 H. & C. 526 ; Green *v* London Omnibus Co., 7 C. B., N. S. 290 ; Storey *v* Ashton, L. R., 4 Q. B. 476.

[2] Goff *v* G. N. R. Co., 3 E. & E. 672 ; Walker *v* S. E. R. Co., L. R., 5 C. P. 640 ; East. C. R. Co. *v* Brown, 6 Exch. 327 ; Allen *v* L. & S. W. R. Co., L. R., 6 Q. B. 65.

[3] Patten *v* Rea, 2 C. B., N. S. 606 ; McManus *v* Crickett, 1 East, 106 ; Mitchell *v* Crasswaller, 13 C. B. 237 ; Storey *v* Ashton, L. R., 4 Q. B. 476 ; Lamb *v* Palk, 9 C. & P. 631.

though under temporary orders, is really acting as the servant of another party. This state of things occurs in such employments as that of a livery-stabler or innkeeper, whose servant is sent with horses to drive the carriage of another. In such cases the master of the driver is liable for the driver's injurious acts, though the driver may be acting for the time under orders of the hirer, and whether or not the coach belongs to the hirer.[1] It makes a difference however if the hirer of the servant himself assumes the management of the horses, for then the liability of the master of the driver ceases, and that of the hirer himself supersedes it.[2]

How servants' acts are distinguished from those of contractors.—The case of liability for injuries done by servants differs from cases where work has been done by a contractor or third person capable of exercising an independent judgment as to his own mode of conducting business. Hence though a master might have been liable for injurious acts done in course of a work carried out by his own servants, yet if such work has not been done by such servants, but has been contracted for and is done by a third party for the master, then the master is no longer liable, the contractor being liable for his own servants and their mistakes.[3] And in doubtful cases, the question is, whether the person charged had any control over the person who did the injurious act.[4] So if the contractor has finished his work and a defect afterwards come to light causing injury, it may be too late to fix liability on him.[5]

The liability, it is true, by virtue of the relation of master and servant, must cease when the relation of master and servant itself ceases to exist.[6] Yet in some cases an owner is liable even for the neglect of his contractor.

[1] Laugher v Pointer, 5 B. & C. 572; Dalyell v Tyrer, E. B. E. 899; Quarman v Burnett, 6 M. & W. 499; Smith v Laurence, 2 M. & R. 1.

[2] Per Parke, B., Quarman v Burnett, 6 M. & W. 499; MacLaughlin v Pryor, 4 M. & Gr. 48.

[3] Murphy v Caralli, 34 L. J., Exch. 14; Rapron v Cubitt, 9 M. & W. 710; Malligan v Wedge, 4 A. & E. 737; Steel v S. E. R. Co., 16 C. B. 556; Butler v Hunter, 7 H. & N. 826; Hole v Sittingbourn R. Co., 6 H. & N. 488; Overton v Freeman, 11 C. B. 867.

[4] Blake v Thirst, 2 H. &. C. 20. [5] Hyams v Webster, L. R., 4 Q. B. 158; 9 B. & S. 1016. [6] Quarman v Burnett, 6 M. & W. 499.

Thus, in all cases where a man is in possession of fixed property, he must take care that his property is so used and managed, that other persons are not injured, and that whether his property be managed by his own immediate servants, or by contractors or their servants. The reason of this is, that the injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others.[1] And the same kind of liability extends to the owner of a stand at a racecourse, which he invites the public to use for payment of a price; and though the contractor was competent, yet if the stand was defective and has injured a spectator, the owner or person receiving money for use of the stand is liable for such injury.[2]

Injuries caused by servant to fellow servants negligently.—Though a master is liable to third parties for injurious acts done by his servants in course of their ordinary employment, another question is, whether and how far the master is liable to his own servants for injuries done by one of these servants to another of the servants in the same employment. On this point the rule is, that a master is not liable to one servant for the negligent injuries caused by a fellow servant. Thus it was, where the two servants were both engaged in driving and managing their master's van, and an accident occurred to one from overloading;[3] where two were filling sugar-moulds, and hoisting them up by a machine;[4] where two railway trains of the same company came into collision through the negligence of the servants on one or both railways;[5] where one was a plate-layer, and the other loaded trucks;[6] where one was a carpenter mending the roof, and the others were porters moving carriages.[7]

This rule as to non-liability of the master for injuries

[1] Laugher *v* Pointer, 5 B. & C. 547. [2] Francis *v* Cockrell, L. R., 5 Q. B. 501; 9 B. & S. 950. [3] Priestley *v* Fowler, 3 M. & W. 6. [4] Dynen *v* Leach, 26 L. J., Exch. 222. [5] Hutchinson *v* York. & C. R. Co., 5 Exch. 343; Wiggett *v* Fox, 11 Exch. 832. [6] Snelgrove *v* L. B. & R. Co., 16 C. B., N. S. 669; Feltham *v* England, L. R., 2 Q. B. 33. [7] Morgan *v* V. of Neath, 5 B. & S. 570.

by negligence of one servant acting with another fellow servant, does not depend on the grade of one servant being higher than that of the other servant, as in the case of a chief engineer in a steamer, engaged with a common sailor in working a winch and raising the screw;[1] a railway-guard injured by the negligence of a ganger of the plate-layers;[2] a deputy or vice-principal working with an ordinary servant.[3]

It was, however, at first thought that this rule as to two fellow servants was confined to the case where both were employed at the time in one common employment or department, and were collaborateurs; but this distinction has been abandoned as untenable. And it is now deemed enough that both servants were in the same employment.[4]

Reason why master not liable for injury by one servant to a fellow servant.—The reason which has been given for this law is, that if the master were liable for every accident to a servant his liability would be infinite; whereas it is no hardship to the servant, for, if the servant do not like the risk of the master's service, he can decline it. Hence, while it is reasonable, that the master should be so identified with the acts of his servant as to be liable to third parties, it is not reasonable that he should be liable for acts done by one of two servants to the fellow servant, seeing that each has so much power to injure the other, and so much opportunity to protect himself against the other's injuries and neglects. In the latter case, therefore, each servant must look after himself, and takes the risk of a fellow servant's negligence, otherwise the master's liability for all such contingencies would only act as a premium on the servant's negligence. And the decision on this subject arrived at by the courts by reasoning from first principles has been said to be one of the most important and useful ever made in the law.[5] The rule equally applies where a volunteer assists the servant and both are engaged in a common operation, in which case the volunteer is in the same relative position as a hired

[1] Searle *v* Lindsay, 11 C. B., N. S. 429. [2] Waller *v* S. E. R. Co., 2 H. & C. 102. [3] Howells *v* Landor Co., L. R., 10 Q. B. 62; Feltham *v* England, L. R., 2 Q. B. 33; Gallagher *v* Piper, 16 C. B., N. S. 669. [4] Wilson *v* Merry, L. R., 1 H. L., Scot. Ap. 326. [5] Vose *v* Lanc. R. Co., 2 H. & N. 728; Priestley *v* Fowler, 3 M. & W. 1.

servant would have been.[1] Yet if such volunteer be at the time also acting for another master, or in his own business, and with assent of the master assisted, then he will be treated as a stranger, and not as a fellow servant so far as regards the rule mentioned.[2]

The discovery of this rule as to fellow servant's negligence, an example of judge-made law.—This rule as to the non-liability of a master for injuries caused by the negligence of one servant to his fellow servant may be said to be a discovery only of the last generation.[3] It is one of the most remarkable illustrations of the way in which new doctrines are developed by judicial reasoning. This process has generally been by lawyers, and even by laymen, boasted of as the pride of the human intellect, though it was denounced by Bentham and Austin as a fraud on the legislature and a scandal to the public. The rule in question, the fruit of that reasoning, when once found and earmarked, has been since recognised as the soundest sense, and has passed current in the business of life like a coin of the realm or a bale of goods having a fixed value in the market. Yet whichever theory of the common law be accepted—whether common law is only the remains of old statutes worn out by time, or a collection of general maxims of wisdom which must be applied to ever-varying circumstances—it must be conceded, that this specific product of reasoning was unknown to Bracton, to Coke, and Hale, to Holt, to Camden, and Mansfield; and while it lay hid in the earlier ages, none of these oracles of the law had the least glimmering of it as a practical conclusion. And yet so clear and self-evident does it now seem, that we are bound to assume, that, if those judges had set themselves to work out the same problem with their own materials, they would have solved it in the same way. This is only another mode of showing how inevitable and beneficial a process that is, which has been ignorantly denounced as judge-made law. It is nothing else but that unity of thought and reasoning which links age to age, and keeps up a body of practical wisdom

[1] Degg *v* Midland R. Co., 1 H. & N. 773; Potter *v* Faulkner, 1 B. & S. 800. [2] Warburton *v* G. W. R. Co., L. R., 2 Exch. 30; Holmes *v* N. E. R. Co., L. R., 4 Exch. 254; Wright *v* L. & N. W. R. Co., L. R., 10 Q. B. 298; 45 L. J., Ap. 570. [3] Priestley *v* Fowler, 3 M. & W. 1 (A. D. 1837).

under the name of law, treating it as a great inheritance, of which each judge is in turn but the steward, and which he passes on with all its current accounts, its undeveloped mines of treasure, and its accretions, to his next successor. The problem in the present instance arose thus: Given that a servant is to some extent the agent or hand of the master. Given that in some contracts one party would be ready to insure the other against all risks, and in some he would not. Given that if two strangers come into collision, and one negligently breaks the other's leg, he must pay compensation for that injury. Given that there are some accidents for which nobody is to blame, and for which no compensation is recoverable. Given that each man is the most vigilant guardian of his own personal safety, and no third party can protect him so well as himself. Given that none would be so foolish as to guarantee another against all the consequences of that other's negligences and mistakes in all circumstances. Given that it is unfair to expose another to risks which he does not know of and has never meant to undertake.

The new combination of facts calling for a solution was this: If a master have a thousand servants, and while two of them are moving a log of wood, one by his negligence breaks the other's leg, is the master to pay compensation for the broken leg of that servant, or is he not? This was the practical point to be ascertained. Each and all of the above axioms and truisms was familiar to all the old judges, but they had never had these specific facts upon which to apply them. Yet it was only by setting one of these propositions against another, balancing them, weighing, sorting, and compounding them, that the court in 1837 arrived at its conclusion, just as Coke and Hale and Mansfield would have arrived at theirs. The chief reasons that prevailed were, that, if the master was to be liable, he would be setting himself up as an Accident Assurance Bank, guaranteeing his servants against the consequences of their own negligence and folly, and giving each a premium for his carelessness: whereas, each servant, knowing all that the master knew, having it in his power to defend himself against danger better than the master could possibly teach him—being on the spot and able to stop at any moment when danger threatened—it was more likely that he should

have all along intended to take this risk on himself than that he looked to the master for his insurance. The court therefore held that the master was not liable for the broken leg caused by the fellow servant's carelessness. The conclusion, such as it was, is an example of judge-made law, a result of fair reasoning and inference from admitted rules and limitations, a balancing of conveniences and inconveniences, such as all other reasoners use when searching for a higher rule to comprehend some new combination of facts.

How far servant has claim against master for injuries in service.—But though the master is not bound to pay damages to his servant who is injured by the carelessness of a fellow servant, yet he is bound to use due care in engaging for each servant proper fellow servants, who are reasonably competent to discharge the duties of the service.[1] If this were not so, a careful servant, however careful, might be incapable of self-defence, if his master thrust him into companionship with unskilful and ill-conducted and reckless fellow servants.

How far master warrants tackle used by servants.—A master is impliedly bound to supply sound tackle and machinery used in any dangerous service, and to do all things, reasonably necessary, for its safe use by the servants. Hence it follows, that if the servant is injured by its unsafe state, the master is liable to the servant. The master ought to know if the tackle is safe so far as it can be made safe by reasonable examination;[2] as, for example, where the tackle of a coal-pit or the shaft is unsafe, and unfit for use of the men;[3] or where dangerous machinery, which used to be fenced, has ceased to be fenced.[4] But a master does not warrant a servant against injuries caused by his own carelessness in doing his work on the master's premises, the risk of all such being impliedly taken by the servant, and especially as the

[1] Hutchinson v York. & C. R. Co., 5 Exch. 343.

[2] Paterson v Wallace, 1 Macq., H. L. C. 748; Williams v Clouch, 3 H. & N. 258; Ashworth v Stannix, 30 L. J., Q. B. 183; Roberts v Smith, 2 H. & N. 213; Skip v E. C. R. Co., 9 Exch. 223; Bartonshill Coal Co. v Reid, 3 Macq., H. L. C. 266; Id. v Macguire, Ib. 300.

[3] Mellor v Shaw, 1 B. & S. 437. [4] Holmes v Clarke, 6 H. & N. 349; Couch v Steel, 3 E. & B. 402.

servant's knowledge must be equal to the master's.[1] A servant is, in modern times, no longer compelled to serve, and may exercise his discretion as to entering on the service; but when once he enters upon it, he must take it with all its drawbacks.[2] And though the master warrants to some extent the tackle and apparatus used by the servant, this applies only to dangerous employments, for in ordinary affairs the servant is or ought to be as good a judge of the sources of danger, and as well able to guard against these, as the master. Hence also the master is not liable for any defect in materials supplied by third parties for the master's or servant's use. If, for example, every tradesman who supplied the master with bad materials, were liable to the servant, who suffered some accident in using these, there would be no end or limit to the number of actions brought. All such accidents accordingly, as between master and servant, must be treated as only the chances of the service.[3] But this rule has again been pushed to excess, and the owner of a mine or a manufactory of dangerous machinery is now absolutely bound by law to fence it, so as to guard against accidents. The master will be held liable, if he fail to obey this statute, unless indeed the servant with his eyes open expressly accepts the risks.[4] In such cases, accordingly, the important point still is, whether the injured person accepted such risk or not.[5] The principle cannot in any case be laid down, that the servant is entitled to calculate on the master obeying this statute; and though it seems singular that a servant can practically dispense with a statute by simply taking the risk on himself, it must be recollected, that however stringent any statute may be, it will never be able to guard entirely against rash and wilful acts.

1 Brown *v* Accrington Co., 3 H. & C. 511; Assop *v* Yates, 2 H. & N. 768; Seymour *v* Maddox, 16 Q. B. 332; Senior *v* Ward, 1 E. & E. 385; Morgan *v* Vale of Neath R. Co., 5 B. & S. 570; L. R., 1 Q. B. 145; Lavell *v* Howell, 45 L. J., C. P. 387; Allen *v* New Gas Co., 45 L. J., Exch. 668.

2 Bolch *v* Smith, 7 H. & N. 736. 3 Collis *v* Selden, L. R., 3 C. P. 495. 4 Vose *v* L. & Y. R. Co., 2 H. & N. 728; Holmes *v* Clark, 6 H. & N. 349; Senior *v* Ward, 1 E. & E. 385. 5 Britten *v* G. W. R. Co., 41 L. J., Exch. 99.

Negligence of servants and masters in dangerous trades.— To reduce the danger arising to servants and workmen in mines and factories, the legislature has intervened to supply some defects. In mines a single shaft is prohibited, and two such means of outlet must be kept open to every seam of the mineral worked by miners.[1] And as an indirect check on the carelessness of management, the owner must give prompt notice of each accident causing personal injury or loss of life to the local inspector.[2] And notice of any likely source of danger given by the inspector must be immediately attended to and remedied.[3] And anyone who wilfully commits an act reasonably calculated to endanger the safety of persons, or cause personal injury in a mine, may be imprisoned for three months, besides being subject to other remedies.[4]

In factories, also, dangerous machinery must be securely fenced, which is likely to cause bodily injury to the employed, and which any inspector points out to the owner's notice.[5] And the same as regards those parts of the works which are peculiarly dangerous to young persons coming in contact with them.[6]

And as manufactories for making and storing gunpowder are more than usually dangerous, severe punishment awaits all who commit acts calculated to endanger life. The factory and its interior must be licensed, constructed, and used according to strict and minute regulations calculated for safety of life, and inspectors are appointed to watch all sources of danger.[7] What clothes workmen shall wear, what things of danger shall be taken inside, what tools and ingredients may be used, are all specified. Gunpowder is not to be hawked or sold in the street, or to children, or unless in canisters marked; it is not to be conveyed except in safe packages. In harbours, railways, and canals minute bye-laws regulate every step of the custody and removal of this material. Any act done wilfully or negligently which is reasonably calculated to

[1] 35 & 36 Vic. c. 76, § 20. [2] 35 & 36 Vic. c. 76, § 39; 35 & 36 Vic. c. 77, § 11. [3] 35 & 36 Vic. c. 76, § 46; 35 & 36 Vic. c. 77, § 18. [4] 35 & 36 Vic. c. 76, § 61; 35 & 36 Vic. c. 77, § 32. [5] 7 & 8 Vic. c. 15, § 43; 19 & 20 Vic. c. 38, § 6. [6] 7 & 8 Vic. c. 15, § 20; 19 & 20 Vic. c. 38, §§ 4, 5. [7] 38 & 39 Vic. c. 17, § 10.

endanger life, is punishable either by fine or six months' imprisonment.[1]

Negligence of physicians and surgeons.—The same care of the body, which is so great an object of the law, often leads individuals to employ physicians and surgeons to cure its wounds and ailments; and though this is matter of contract, yet, inasmuch as it is more important for each to know what remedy is open to him for unskilful treatment and consequent pain and injury than to seek a remedy on the contract, some notice is here required of these cases. The universal rule relating to such matters is, that every person, who enters a learned profession, undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is a solicitor, that at all events he shall gain the cause; nor does a surgeon impliedly undertake to use the highest possible degree of skill; but he undertakes to bring a fair and competent degree of skill to bear on the case.[2] If therefore one suffers pain or death from the negligence of those skilled operators, the main question involved will be, whether the treatment showed ordinary professional skill, and as to this the opinion of experts is usually brought to bear. In this country the legislature has come to the assistance of the common law by requiring all who practice surgery and physic, at least as a profession, to be registered as such, and this again is only possible after a degree of knowledge and education have been attained, which is the best guarantee against danger to human life.[3] False pretenders to this qualification are liable to a penalty.[4] Nevertheless, as it may still happen that one who has no such qualification may undertake and contract to effect a cure, and possibly injure the body, the law also requires that each adventurer as well as a licensed medical man shall possess competent knowledge, and each is liable to an action for negligence if he do not bring such knowledge to bear.[5]

[1] 38 & 39 Vic. c. 17, § 79. [2] Lanphier v Phipos, 8 C. & P. 479.
[3] 21 & 22 Vic. c. 90; 22 Vic. c. 21; 22 & 23 Vic. cc. 7, 66.
[4] 21 & 22 Vic. c. 96, § 40.
[5] In ancient Egypt physicians were paid by the state, and they had fixed rules for treating diseases and administering physic; and if they adhered to the letter of the rule they were safe, but if they

Negligence in selling poisons.—The natural right of every man to carry on any kind of business, and the inherent tendency of all men to carry on that business in the way most profitable to himself, regardless of the rights and risks of others, has likewise induced the legislature to interfere and amend the common law as to the right of selling and buying poisons. While the seller and buyer is each intent on what he is doing, and thinks little or nothing of how innocent third parties may become affected by the article bought and sold, certain precautions as to the sale are enforced in order that competent persons may alone sell such articles, and if sold, that the origin of any mischief may be more easily discovered. Hence statutes enforce restrictions of this kind. The ultimate object of these statutes is to prevent danger to life, but as the nature of the restrictions belongs more properly to the business of chemists, druggists, and medical men, they fall properly to be noticed under that division of the law entitled the "Security of Contract."[1]

Negligence in setting spring-guns and engines.—Another head of negligence which once caused pain and injury to the body, more frequently than it now does, arose from the practice of owners of land using spring-guns and deadly engines as a means of protection against trespassers. This practice took its rise in the selfish and engrossing view, that property must and may be lawfully defended at all hazards to life and limb; and though the owner did not intend to wound or kill any one, but only to cause terror to intending trepassers, and so to protect his interest, yet the exclusive attention to this one object, regardless of all consequences to others, is only another illustration of the same kind of negligence as that which has been displayed in the cases already enumerated, though in this instance such

deviated, and the patient died, they were punished.—*Diod. Sic.* b. 1. And by the law of Zoroaster, a physician was ordered to commence practice on the infidels, and if three patients died successively, he was deemed unfit to practise on the faithful, and was cut in pieces. But if he succeeded thrice, then he was encouraged, and deemed qualified to practise on the faithful.—*Zend. Av.* tit. 1, p. 2.

[1] Arsenic Act, 14 & 15 Vic. c. 12; Pharmacy Acts, 31 & 32 Vic. c. 121; 32 & 33 Vic. c. 117; Sale of Food and Drugs Act, 38 & 39 Vic. c. 63.

negligence was more likely to be fatal in certain contingencies.

The legality of this practice was much discussed half a century ago, and much doubt existed and still exists as to what was the precise limit of a landowner's powers at common law to protect his rights of property against all comers, without incurring the liability of an action or an indictment. Sometimes owners put up a notice on the boundary of their estate notifying that spring-guns were set in the fields and woods, and that trespassers must beware; and sometimes no notice was put up at all. But whether or not notice was given, it was found that trespassers entered the forbidden ground, and were dangerously wounded and sometimes killed. In one case, in 1820, where notice had been put up, stating that these engines were set in the plantation—there being in reality ten spring-guns in a wood of sixty acres—and a trespasser gathering nuts had been wounded, the court held that no action was maintainable by reason of his having read and known of the notice, for he had only brought the mischief on himself.[1] In another case, in 1828, where no notice was put up, it was held that an action was maintainable; and hence when a lad went into his neighbour's garden to recover a favourite peahen that had strayed, and was wounded by a spring-gun set there, the court held that he was entitled to damages, because the owner ought to have given notice of such a dangerous engine being there.[2]

The doctrine of the common law on this subject justified the placing of spring-guns on this ground, that as the owner could not always be watching his fields in person, and so proportion force to force in extruding trespassers, he could only do so effectually in his absence by placing an instrument, which by the joint effect of terror and physical pain or death (the latter confessedly in excess of the requirements), would put a stop to the trespasses. The basis of all this seemed to be, that property, and not human life, must be protected at all hazards. The common law obviously could say nothing to extenuate the flagrant injustice of occasionally taking away the life of innocent persons without cause, and even of trespassers without adequate cause. And as the common law thus seemed to

[1] Ilott v Wilkes, 3 B. & Ald. 304. [2] Bird v Holbrook, 4 Bing. 628.

extenuate a species of impersonal assassination, at last the legislature, with higher views of the relative importance of life and property, had to intervene to cover over this conspicuous defect.[1]

When the law as to spring-guns was about to be altered in 1825, the Lord Chancellor said that on every occasion that this question had come before courts of law, the judges had been about equally divided. Lord Ellenborough, C. J., opposing the bill to render it illegal to set spring-guns, said the gardens near London principally owed their security to the engines that were set in them, and that gardeners had no other means of protecting them.[2] After much discussion a statute passed, which drew a distinction between dwelling-houses on the one hand, and gardens, fields, and woods on the other.[3] The law now is, that who-

[1] The Burgundians had laws as to this subject, but took more care of the public, for they compelled a man who set spring-bows for killing wild beasts, under pain of answering for all damage, to give public notice that they were set, and to designate the place by certain marks.—*Leg. Burg.* tit. 46. But the English landowner claimed the excellence and potency of his device to consist in this, that the exact site of the engine was purposely concealed, and so that trespassers might be deterred from setting foot in any part of the territory.

The legislature, for similar reasons, has compelled owners of abandoned mines to fence the shafts.—See *ante*, p. 265.

An able legislator, discussing this subject in Parliament, said in 1825, "It was not expedient that those persons, in whom the possession of the soil was vested by conventional laws, should render the earth, which was given to mankind in general as an abiding place, unfit for that main purpose. He must not deal with the portion of land which fell to his lot, so as to render it an infernal region, within which he might usurp the power of inflicting death on all comers. . . . What would be the condition of the country if every hollow contained a man-trap and every bush a spring-gun? The earth would become a hell, and mankind would be divided into devils and victims. A legislature was bound thus to look at the general consequences of any practice submitted to its review."—*Per C. Tennyson*, M.P., 13 Parl. Deb. (2nd) 1264.

[2] 12 Parl. Deb. (2nd) 1020; 17 Id. 267.

[3] An ingenious rural divine in those days, taking advantage of the popular terror, put up a notice on his garden wall that a *polyphloisboio* was set there. This caused the wondering rustics to stare, to pause, meditate, and feel alarmed at the infallible powers of this unknown engine; and it is said they all ended by carefully abstaining from trespassing in that garden.—13 *Parl. Deb.* (2nd) 1258.

soever shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same, or whereby the same may destroy or inflict grievous bodily harm, upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanour, and liable to penal servitude for five years, or imprisonment for two years with or without hard labour. To wilfully allow such traps, &c., to remain on his lands is the same as to put them there in the first instance. But there is nothing illegal in such gins or traps as are usually set to destroy vermin. And it is not unlawful even to set spring-guns, &c., from sunset to sunrise for the protection of a dwelling-house.[1]

Conclusion of account of bodily injuries from negligence.—We have now noticed all the leading heads of negligence whereby injury, pain, and death are caused to the body, not intentionally, but in circumstances under which the law nevertheless declares it culpable in parties not to take more precaution against interfering with the safety of others. Too exclusive and engrossing pursuit of one's own business and selfish interests is the cause of such injuries, and they are properly corrected by the law. A suitable compensation is and ought to be imposed for such acts of inattention and thoughtlessness as regards the interests of others. We have next to consider another class of injuries, produced, not indeed without intention, but with intention, yet without any set malice and wickedness of purpose, namely, such assaults as are caused mostly by heat of blood, and which, through irritating at the moment, are soon forgotten.

[1] 24 & 25 Vic. c. 100, § 31; 27 & 28 Vic. c. 47.

CHAPTER III.

PROTECTION OF THE BODY AGAINST INJURIES INTENTIONAL, BUT NOT MALICIOUS.

Wilful or intentional injuries classified.—Having stated the provisions which the law has made against the threat and well-founded apprehension of wrong to the body, and against such actual injuries as are caused by negligence or the thoughtlessness of others, we now come to consider what the law does for the protection of the body against actual, wilful, and intended wrong. In the first case the law seeks to prevent mischief; in the other cases to punish in some way the party who has already committed it. The one remedy looks to the future, the other remedies redress the past. It is true that the difference between the two kinds of remedy is very slight, for no kind of punishment or of preventive means that can be named or devised, can wholly prevent pain or injury from being caused by one human being to another. The mind is too subtle and mysterious in its movements to be controlled, except by adding fresh motives against acting in such a manner as to occasion damage to a fellow creature, in other words, by increasing the punishment that will be exacted if the thing prohibited should be done. Motives of this kind, being the only weapons which the law can devise for controlling the acts of man and directing the movements of a free mind, the preventive machinery already described of swearing to the peace is only another name for doubling the punishment if the offence should be committed. For if the party should, notwithstanding all the formalities and deliberate warnings attending his finding sureties for keeping the peace, actually break the peace, all that will then happen is, that besides the ordinary punishment

assigned to the act or crime, he and his sureties must pay a sum of money to the crown or be imprisoned for not doing so. And a marked distinction may be made in classifying actual personal injuries which are wilful or intended. Some are the fruit of hasty passion or fits of temper, and though often attended with serious pain, yet in the great majority of instances they are trifling and soon forgotten; while others are characterised by a studied, malignant, and revengeful spirit, that stops short at nothing less than death, or something near it. While murder and malicious wounding are of this studied and deliberate kind, those of the lighter kind are treated separately under the head of assault, which, though sometimes accompanied by a malicious and deliberate intention, are yet more frequently caused by temporary heat and irritation. Our present subject, therefore, will be assaults only.

Assault and battery.—The smallest of the injuries which are done to the body intentionally, and which the law furnishes the means of punishing, are classed under the general name of assault and battery. These injuries include almost every kind of pain or suffering intentionally caused to the body, and also every kind of threat of immediate injury, which, though applied to the mind rather than the body, is nevertheless oftentimes more intensely painful, and causes a more serious interruption of business. And where insolence accompanies the act or threat, though the actual bodily suffering may be none at all, or of the slightest degree, yet the accompanying circumstances magnify its importance, and constitute it a good ground of action, which may often sound in heavy damages.

An assault consists in an attempt to touch or strike another's person against his will, or in using an imminent threat to do so forthwith. Thus to strike at one, but not hit him, is said to be an assault, but no battery;[1] and so is the throwing of water upon one's body.[2] An assault is resolvable into four elements:—(1) the intention of the assailer; (2) the attempt to touch the person, or the threat to do so forthwith; (3) the non-consent of the assaulted; and (4) the want of lawful excuse. A battery is a term more

[1] Com. Dig. Battery, C. [2] Pursell v Horne, 8 A. & E. 604.

limited in meaning and denotes a later stage of the assault, when an actual blow has been given, direct or proximate, or a touch accompanied with insolence or anger. But in popular and even in legal language, assault and battery are used as almost synonymous terms, and the offence is usually the fruit of hasty temper.[1]

Intention as an ingredient of an assault.—The intention is a leading legal element in every assault and battery, for it is obvious that a stroke may be given, and even pain inflicted, without the knowledge or consent of the person from whom it proceeded; and hence, because the hostile motive is wanting, there may be no real ground of action. Thus it is, if one were to touch a person to call attention to something affecting his duty or interest;[2] by way of joke or friendship;[3] or in the exercise of a legal right, such as elbowing one's way through a crowd with as little force as possible.[4] In such cases the offensive intention is wanting, and so there is nothing blamable in the eye of the law, at least if moderation be observed in the act which is done. There are many acts of rudeness, the result of habitual thoughtlessness or selfish indifference to the feelings of others, which run close to this department of legal redress, but are too slight and insignificant for the cognisance of the law. The courts of law are wholly incompetent to inculcate or enforce good manners or punish incivility; and the experience of every one suggests how wide a field of annoyance to others is thereby left unguarded. There must be a limit drawn somewhere to divide petty provocations from those substantial annoyances, which usually operate on sensible minds as a hindrance to the business of life.

As the intention to commit the act is thus a necessary ingredient of an assault, it also follows as a necessary consequence, that if the act imputed was nothing but what is popularly known as an accident, not involving

[1] It is said that the Aleutians, when a quarrel occurs, do not come to blows, but take their revenge out by fixing an apt nickname on the wrongdoer, to which the aggrieved often adds a recital of the shortcomings of the wrongdoer's parents.—*Dall's Alaska*, 392.

[2] Coward *v* Baddeley, 4 H. & N. 481; Wiffin *v* Kincaid, 2 B. & P. 472. [3] Per L. Hardwicke, Williams *v* Jones, Hardr. 301. [4] Cole *v* Turner, 6 Mod. 149.

blame or negligence, this negatives the unlawful intention: as, where, in course of a common employment, one man, throwing skins to another, hits him in the eye;[1] or a horse is frightened by a clap of thunder, runs away, and knocks down a passenger in the street.[2] It is also no assault where in course of a game one hits another. But if cudgel-playing take the form of a deliberate fight, and is not mere play, then, being unlawful in itself, a hostile intent is not rebutted by proof of an accident, as will be seen when one of the combatants accidentally strikes a third person. And it may be said, that, though it is often difficult to distinguish an assault from a mere accidental collision, the assault is nevertheless so far a *primâ facie* presumption, that he, who seeks to excuse or justify what is *ex facie* an assault, is bound to set up that as a special defence.

The means used to assault.—Whether the assault and battery be committed by a direct stroke, or by some less immediate means, is wholly immaterial; and the actual pain or suffering caused is of little consequence as regards the right to redress. If one were to upset another's chair or carriage, and so cause a fall:[3] or strike the horse and so throw its rider:[4] or throw water over one:[5] or spit in one's face:[6] or without leave cut another's hair or knock off his hat:[7] or when tossing a squib into the market-place, one man catches it and sends it on to another, who is wounded:[8] or when a drunken man is pushed against another:[9] or when unlawfully aiming a blow at one person, another is struck:[10] or, as Holt said, the least touch of the person in an angry manner:[11] in all such cases an assault and battery is committed in the eye of the law.

Though nothing is deemed to be a battery, unless a blow be actually struck, or is the immediate consequence of the act of another, it is not to be supposed that the law takes no cognisance of the injury, merely because it is one of the more remote consequences of another's act. All that is

[1] R. v Gill, 1 Str. 190. [2] Gibbons v Pepper, 4 Mod. 405; 1 L. Raym. 38; 2 Salk. 637. [3] Hopper v Reeve, 7 Taunt. 698. [4] Dodwell v Burford, 1 Mod. 24; Sid. 433. [5] Simpson v Morris, 4 Taunt. 821. [6] R. v Cotesworth, 6 Mod. 172. [7] Forde v Skinner, 4 C. & P. 239. [8] Scott v Shepherd, 2 W. Bl. 892. [9] Short v Lovejoy, Bull. N. P. 16. [10] James v Campbell, 5 C. & P. 372. [11] Cole v Turner, 6 Mod. 149.

meant is, that the injury, whatever it be, will not come within the head of assault and battery or be dealt with by the appropriate proceeding of an action of trespass, or the other punishments applicable thereto. Nevertheless, such injury may be punishable in another action which is often called an action on the case, as having been caused by the negligent act or conduct of others. Indeed, the general rule is, that whenever a trespass has been committed, nothing but inevitable necessity, or at least the absence of any blame, will excuse the person whose act or conduct materially contributed to produce such an effect.[1] If, for example, from a sudden fright a horse were to run away with its rider and run over a man, it would be no battery; but if this consequence was occasioned by a third person whipping the horse, then such third person would be liable for the battery.[2] And an assault has even been deemed to be committed by withholding food from, or exposing to inclement weather, a child whom one is under a duty to feed and clothe;[3] though it is so, only when some hurt or injury results.[4] And hanging a child up in a bag is deemed by the law an assault on such child.[5]

The assault or blow must be actual or imminent.—And where no actual blow is struck either immediate or mediate, but an assault or threat is used, if such threat is imminent and made by one who is in a position to carry it out forthwith, and it is so understood by the person assaulted or threatened, this will be deemed in law an assault; as where the hand is lifted to strike, or a horse is urged to ride one down:[6] where a gun or stick is aimed or sword drawn within range:[7] or the sleeves are tucked up to fight.[8] While, on the other hand, if the threat is merely to be carried out at some future time, and is not attended with any immediate inconvenience, the action will not lie.[9]

1 Dickenson *v* Watson, T. Jones, 205; Underwood *v* Hewson, Str. 596; 1 L. Raym. 467. 2 Gibbons *v* Pepper, 4 Mod. 405; 2 Salk. 637; 1 L. Raym. 38. 3 R. *v* Ridley, 2 Camp. 650. 4 R. *v* Renshaw, 2 Cox, C. C. 285 5 R. *v* March, 1 C. & K. 496. 6 Martin *v* Shopper, 3 C. & P. 373; Stephens *v* Myers 4 C. & P. 350. 7 R. *v* St. George, 9 C. & P. 493; Osborn *v* Veitch, 1 F. & F. 317. 8 Read *v* Coker, 13 C. B. 860. 9 Cobbett *v* Grey, 4 Exch. 744.

It has been said more than once, that presenting a gun at another is not an assault, if the gun is not, in point of fact, loaded.[1] But this can only be just and sensible, where it is quite clear that the person aimed at knew that it was not loaded; for if he did not, the terror would be just as great under the uncertainty as under the reality. And, at all events, presenting a loaded gun at half-cock is an assault, for though it could not go off in that form, a momentary touch of the finger could alter the case.[2] So no words, however irritating, if not accompanied with a threat of the kind mentioned, will, in the eye of the law, amount to an assault; though in former times, when men's passions were less under control, this was considered an excusable cause for a blow, as being done in self-defence. And yet if, in the heat of passion, a blow shall be given for sharp words, and an action be brought, the jury may give nominal damages only, and the judge may, so far as he can, deprive the plaintiff of his costs.[3]

An assault implies that it is against consent of assaulted.—A material legal ingredient also in an assault and battery is, that the threat or blow is against the consent of the person, for the maxim *volenti non fit injuria* will then apply. Hence in a game or sport, such as wrestling or boxing, or playing at cudgels, this licence is either express or presumed, and the mutual exchange of blows excludes this necessary ingredient of the cause of action. Thus, if two persons agree to play at cricket together, and the one strikes the other with the ball in the course of the game, inasmuch as the consent to take the risk of usual incidents was implied, it would be a contradiction in terms to sue for this as an assault.[4] If, indeed, two parties fight together, though in a certain sense each may be said to license the other to beat him, yet the law will not excuse the blow, if either chooses to resort for redress to the court, seeing that all such conduct necessarily implies a breach of the peace, and is thus unlawful if the other chooses so to treat it.[5] And though there can be no assault

[1] Blake *v* Bernard, 9 C. & P. 626; R. *v* James, 1 C. & K. 530; R *v* Baker, 1 C. & K. 254. [2] Osborn *v* Veitch, 1 F. & F. 317.

[3] The Romans distinguished beating without pain, *pulsatio*, from beating with pain, *verberatio*, and prohibited both,—ff. 47, 10, 5.

[4] Christopherson *v* Bere, 11 Q. B. 477. [5] Bull. N. P. 16.

unless it be committed against the consent of the party assaulted, yet if the consent or pretended consent is obtained wholly or partially by a trick or misrepresentation, the act done will then not the less be an assault: as where a schoolmaster takes liberties with a female scholar;[1] where a doctor pretends that it is necessary to strip, or otherwise treat a female patient,[2] and thereby under the false impression a kind of simulated consent is procured. And so jealous is the law of such a defence being set up, that it is incumbent on the defendant to set out in the clearest manner, that the act of assault was either unavoidable, or with consent, and so involved no blame, otherwise the presumption will be against him.[3]

This doctrine, that consent of the party assaulted will negative the legal character of an assault, has been carried to what at first sight appears an extravagant extent in the case of children. Thus it has been held no assault at common law for a man to take indecent liberties with a child between ten and twelve, or even under ten, provided the child consented.[4] It might have been expected that there was nothing to prevent a court holding that a child's consent, in such cases, should be immaterial, if such child was incapable of knowing the nature of the act to which she is assumed by the law to consent, and thus it might have been treated as a question of fact in each particular instance for the court, or jury, or justices deciding it. Owing, however, to the singular and exaggerated importance often assigned to precedents, it may be now impracticable to treat this last view as correct in law.

Some assaults are excusable or justifiable.—Another characteristic of an assault is, that there should be no legal excuse for it, and this introduces a large class of exceptions or legal excuses, which are recognised as adequate reasons, why the law should overlook the apparent wrong. And at the outset one maxim is adopted, namely, that a blow for a word shall not be allowed: in

[1] R. v Nichol, Russ. & R. 130. [2] R. v Rosinski, 1 Moody, C. C. 19; R. v Case, Den. C. C. 580 [3] Weaver v Ward, Hob. 134; Dickenson v Watson, T. Jones, 205.

[4] R. v Meredith, 8 C. & P. 589; R. v Banks, Ib. 574; R. v Martin, 9 C. & P. 213; 2 Moo. C. C. 123; R. v Cockburn, 3 Cox, C. C. 543; R. v Johnson, 1 L. & C. 632.

other words, however irritating another's language may be, the party addressed is not justified in dealing a blow in answer to it, for in a settled state of society, where actions and remedies of all kinds abound, each should be able to control his temper, and not use his hands to express, or to vindicate, or to give emphasis to his opinions or feelings. Hobart attempted to explain why it was, that the law did not allow any man to strike in private revenge of ill words, and his reason was, that there was "no proportion between words and blows, but he that is stricken may strike again." [1] The same learned judge however admitted it to be true, that there is a judicial combat allowed before the constable, if a man be called "traitor." Perhaps a more lucid reason may be suggested, namely, that a blow is only the revenge of barbarians for the want of a ready answer by the tongue, and that the strength or readiness of a man's hand has nothing to do with his quarrel being just.

Self-defence against blows.—While words however may not be answered by blows, it is otherwise when blows are first given, for then other blows may be returned.[2] To ward off blows and overcome them with greater blows is one of the laws of nature, which no advance of civilisation is ever likely to render superfluous or wrong. Hence I may lawfully return blow for blow, or may strike in order to ward off an impending blow from my own person, whenever there is no other means of protection. Some discrimination is however necessary in order to keep one's acts of self-defence within their proper sphere, so that what is meant to be a shield may not be used too liberally as a weapon of offence. If I have been already assaulted, and further assaults are likely to follow, I may lawfully strike my assailant, and even though no further assaults were reasonably to be apprehended, I will not be too nicely judged if in the heat of the moment I have in a spirit of retaliation dealt a finishing blow. Yet even in the latter case some proportion is to be observed between the strength of the assault and the apprehended danger which it was intended to ward off; for if the assault is trifling, then a battery or maiming of undue severity inflicted in order to guard against such assault cannot be justified,

[1] Lord Darcey v Markham, Hob. 120. [2] Wise v Hodnell, 11 A. & E. 816.

whichever of the parties may have made the first assault.[1] As Holt, C. J., said, hitting a man a little blow with a little stick on the shoulder is not a reason for him to draw a sword and cut and hew the other.[2] The blows of self-defence are thus only excusable so long as the transaction is one and continuous; for after my blood has cooled, and an interval has elapsed, I ought no longer to think of physical force as my remedy, seeing that the law will sufficiently redress the grievance by its own appropriate forms.[3]

Assault in defence of child or wife.—Not only is it excusable for one to assault another in self-defence, but the same excuse is extended in deference to the feelings of human nature, where the assault is made in defence of one's wife or child. In this respect the law makes allowance for the indignation natural to one whose social affections may be outraged by violence or insult; and if in protecting these near relatives it is reasonably necessary to commit an assault and battery, the circumstances will afford sufficient excuse. It is difficult indeed to draw the line between one near relation and another, and a parent, brother, sister, or husband may equally well claim the same degree of zeal, more especially if ill-health or special circumstances render these relatives incapable of self-defence.[4]

[1] Dauny *v* Lucy, Sid. 246; Keb. 884. [2] Cockroft *v* Smith, 1 L. Raym. 177; 2 Salk. 642.

[3] Cockroft *v* Smith, 11 Mod. 43; R. *v* Driscoll, 1 Car. & M. 214.—It is often a question of difficulty to decide in case of two persons assaulting each other, how to separate the blamable from the innocent party. The Gentoo Code obviously thought this was impracticable, for it fined both parties, but the one who first struck was made to pay the larger fine.—*Gentoo Code*, c. 3, § 3. But Puffendorf said of private assaults as of public wars, that the aggressor is not he, who gives the first blow, but he who first resolves and prepares to give one.—*Puff. Man & Citiz.*, b. 1, c. 5, § 17.

Self-defence is, moreover, distinguishable from taking the initiative, or what is known as taking the law into one's own hands—that being an offence according to all laws, and one which lies at the root of law itself. Even the Kaffirs punish a man for taking the law into his own hands, or for anything like retaliation.—*Maclean's Kaffirs*, 111.

[4] Leward *v* Baseley, 1 L. Raym. 62; 3 Salk. 46.

If master and servant are justified in striking in defence of each other.—Not only is a parent entitled to strike in defence of a wife or child, but a similar rule has been extended to servants, for it has been often said a servant will be admitted to justify an assault and battery in defence of his master about to be struck in his presence,[1] and in like manner a master in defence of his servant.[2] This last point however has been doubted, on the ground that though the servant is justified in defending the master, the converse is not true.[3] The relation of master and servant was once more close and confidential than it now is, and the habits of society insensibly react on the law, and may change it by degrees. Much will depend even in this branch of the law on the nature of the service and the duties arising out of it. And certainly where the relation is no closer than that of master and servant, the courts are reluctant to admit this justification, seeing that the party may be deemed usually able to protect himself in circumstances which at most give rise to a civil action. Hence a servant has been deemed to be not justified in striking in defence of his master's son,[4] or to strike one who was about to beat his master's horse, for this was said to be a premature and somewhat remote precaution.[5] And for the same reason it is not deemed any justification that the assault was committed by a tenant in defence of his landlord,[6] or by one neighbour or friend in defence of another.[7]

All justifiable assaults must be to protect, not revenge.—In all cases, however, except in self-defence, it is necessary to show, that the assault was made not by way of revenge or retaliation, nor even in hot blood, nor on the spur of the moment, but solely in order to prevent an injury to some person, whom it was a natural duty to protect; and therefore, if the ground of provocation be past, an assault which in the heat of the moment would have been justifiable, will then cease to be so.[8]

Assault in chastising children.—A child however young

[1] Barfoot *v* Reynolds, 2 Str. 953. [2] Tickell *v* Read, Lofft, 215. [3] Seaman *v* Cuppledick, Owen, 150. [4] 1 Hawk. c. 60, § 24. [5] Shingleton *v* Smith, 2 Lutw. 1481, 1483. [6] 1 Hawk. c. 60, § 24. [7] Leward *v* Baseley, 1 L. Raym. 62; 1 Salk. 407; 3 Salk. 46. [8] Barfoot *v* Reynolds, 2 Str. 953.

is entitled to the same protection as adults against every kind of assault and wrong, but owing to the peculiar relation between parent and child, the law allows, that there may be good reasons why corporal punishment should be inflicted on children as part of a wholesome discipline. Every parent, accordingly, is entrusted by the law with the power of moderate correction and chastisement, if the child be of tender years and is under his care. This power does not, however, strictly speaking, belong to the parent merely as such, since it is given for like reasons to every person, whether a relative or not, under whose care and custody for the time being a child of tender years is placed. It is because the parent is the natural guardian of the child when living with him that this power arises, and because the law takes notice that occasional correction is a necessary, or at least usual, part of education.[1] It is solely on the ground, that education is necessary and proper for a child, that such power of correction is entrusted to the guardian; it is not for any intrinsic merit in the mere flogging. But it is essential in the exercise of the power, that the correction administered be in all cases moderate, and that any implement used be also of moderate power, and be used with moderate force. The law cannot, indeed, enter into the minute inquiry, how far this or that occasion for chastisement of a child is wise or judicious. The parent must be entrusted with a reasonable discretion to that extent. But whenever in the opinion of intelligent bystanders the moderation is exceeded, and paternal power is used as a cloak for mere unbridled passion and ferocity, then it is time for third parties to interfere, and if necessary to prosecute the offender. Whether a parent can justify correcting a child for saucy and contumacious conduct is only another form of the question, as to whether that education which a parent may be presumed to give includes all modes of decorous bringing up and good conduct.[2]

[1] The Creek Indians, it is said, never beat their children, but with a needle or pin let blood on the legs or thighs.—5 *Schoolcr.* 273. The Spartans allowed a parent to chastise any other person's children as well as his own.—*Montesq.* b. 5, c. 7.

[2] "A parent has not only the power, but it is his duty, to correct his child; but instead of inflicting five or six strokes with a few

In the case of excessive severity being used towards children, the appropriate remedy is not a civil action, but an indictment or a summary proceeding before justices: and the whole circumstances—the alleged occasion—the weight of the blow—the nature of the instrument used—the marks of violence discovered—and all other particulars must be taken into account by the justices or jury whose duty it will be to inquire into the case.

Schoolmasters correcting children.—The same moderate power of correcting children when under instruction, which a parent or guardian possesses is impliedly delegated to the schoolmaster who is engaged to perform the office of instructor, and he can set up a like justification for moderately chastising his pupil. And the reasons which govern the conduct of a parent, as well as the bounds set to the exercise of his power, apply equally to the case of the schoolmaster, who is equally liable for any excess in the punishment. It seems to be universally assumed that corporal punishment is an indispensable ingredient in the education of young children, though some skilful teachers know how to dispense with it. Yet an excess of chastisement in any case will be unjustifiable, and the law will exact a strict account of every blow from a schoolmaster, or from a parent, or any other person, under whose care a child is for the time placed.[1]

Assault in correcting apprentices.—The case of an apprentice differs considerably from that of children of tender years, for though adults as well as children may enter into such a contract, it is usual for apprentices to begin their term of service while they are still children. Apprenticeship is usually a double contract, including

birch twigs on that child, if he inflict five or six hundred, though the instrument be a legal instrument, and cannot be quarrelled with, yet the extremeness of the quantity may denote an intent to do mischief, not bridled by that which ought to bridle human actions. If again the instrument itself is improper, suppose that instead of five or six strokes with a rod, you give five or six blows with a cudgel, it may be said that was an instrument likely to kill the child, and would be an excess with respect to the instrument itself." —*Per Macdonald*, C. B., R. *v* Wall, 28 St. Tr. 145.

[1] In 1823 Sir R. Peel told the House of Commons that flogging in public schools should be abolished by Act of Parliament, but this has not yet been done.—8 *Parl. Deb.* (2d) 1439.

service on the one hand, and teaching on the other hand. The apprentice is a servant as well as a pupil. The master is also a teacher as well as a master. And it is solely in virtue of the contract to teach that the master acquires any power whatever to correct or chastise an apprentice. The duty to serve is in no way qualified by any incidental power of the master to punish; for this would be only allowing a man to take the law into his own hands. Hence, whenever the apprentice is an adult or has arrived at an age of capacity to know right and wrong, an age to be punished for crime, the master ceases to have any authority to correct him by corporal pains. The master must then, according to his contract, still do his best to teach; yet if the apprentice is beyond correction and deaf to remonstrance, the master cannot call to his aid the parental power of chastisement, but can only rescind or abandon the contract, if the temper and disposition have arrived at a pitch of settled insubordination.

The law, it is true, has been somewhat loosely explained on this subject, and there are dicta, however vague, to the effect, that it is a defence for such assault or chastisement, that the apprentice was saucy.[1] And correction of apprentices has been said to be justifiable, without defining the age or object.[2] But on such a point as this, affecting the liberty of the subject, precedents and dicta ought to have little weight, seeing that the manners of a ruder age must always unconsciously influence the judgment.

Masters assaulting servants.—Though the general rule is, that a blow for a word is not to be allowed, yet it is singular that, as between master and servant, the notion has long been countenanced, that a master is at liberty to give emphasis to his views, feelings, and commands by supplementing them with a blow, or even with many. Such a notion, no doubt, has come down from before the dark ages, when slaves could be kicked and beaten at the master's or owner's discretion; and though personal service is now a free contract, yet the ancient taint is not wholly obliterated. Cato the censor, after a dinner-party, used to correct with leathern thongs those slaves who had been inattentive, or had suffered any

[1] Penn v Ward, 2 C. M. & R. 338. [2] 3 Salk. 46.

thing to spoil.[1] And our own law for many centuries back has been too indulgent in its practice towards masters in this respect. It seems that in the time of Henry VIII. it was thought legitimate, and a matter of course, for lords and masters to strike their servants with their hands or fists and any small staff or stick, for correction and punishment; and this was expressly saved out of the category of murders and offences done within the king's household.[2] And in the time of James I., when stabbing was made felony, it was thought necessary to save from the statute those who, in chastising children and servants, chanced to commit manslaughter.[3] Hale says the law allowed a master to use moderate correction. Holt, C. J., says more than once, that a master has a right to strike his servant by way of correction.[4] And Lord Raymond, C. J., said the master might correct a servant in a reasonable manner for a fault.[5] All that Blackstone says is, that a master may correct his apprentice for negligence or misbehaviour.[6] But notwithstanding all these dicta and assumptions, which are the reflection of more coarse and barbarous habits, nothing seems more clear than that the contract of service in the present day gives no such implied authority to one party to enforce his views by breaking the peace; and whether this view arises out of a higher tone of morality, or a growing consciousness of the complete repertory of remedies which the law has elaborated for every kind of wrong, few judges would repeat or act on the sayings and practices on this point of the most admired oracles of the law, even a century old. It is true, that when provocation is listened to as an excuse, the provocation of masters must have some weight; but this at best can be an uncertain resource, seeing that every class of mankind have about equal provocations to tempt them to acts of violence.

Husbands assaulting wives.—The same views and habits, out of which grew the dictum, that masters may at discretion beat their servants, at least for what they consider faults, has led to the popular belief that a husband could beat his wife, or, as it was called, correct her; and the same tainted origin of slavery and slavish

[1] Plut. Cato Cens. [2] 33 Hen. VIII. c. 12, § 6. [3] 1 Jas. I. c. 8. [4] 17 St. Tr. 67. [5] 17 St. Tr. 54. [6] 1 Bl. Com. 428.

notions may account for such doctrine. This arbitrary power of husbands began to be doubted in the time of Charles II.[1] The difference between modern and ancient practice on the subject consists chiefly in this, that courts and juries will now attribute more weight to even trifling assaults or ill-usage, than would be allowed to these in former times. A wife has for centuries enjoyed the remedy of binding a husband over to keep the peace, and she has a remedy for cruelty in the Divorce Court; and with these remedies it may be taken now as a fixed rule, that the contract of marriage in no sense implies any licence or authority to the husband to beat or correct his wife, though such offences may be more difficult to prove, and thus may appear to be to some extent without redress.

Churchwarden assaulting persons misbehaving in church.—There is one case in which an assault is said to be justified by reason of an official duty. Thus a churchwarden, who is deemed by law bound to see that decorum shall be observed in church, may remove the hat of a person in the church, if the latter fails to do so on request;[2] and he may whip boys misbehaving in the churchyard for a like reason. But when shorn of these high prerogatives, a churchwarden seems to be only as other men in respect to the present subject. It has indeed been said, that a person who is struck in a churchyard, cannot justify striking again in his own defence.[3] The ground was said to be, that it was a sanctified place,[4] and it was like striking one in court or within view of the courts. But this last proposition has been narrowed to striking in the court while sitting, for then the party may be punished by the court then and there. And there is nothing now to support the doctrine, that self-defence in a churchyard is less allowable than elsewhere.[5] It is however to be borne in mind, that to assault, arrest for civil process, or obstruct a clergyman in performing his duties in a church or during burial in a churchyard is of itself a misdemeanour.[6] And three centuries ago one, who struck another in a churchyard, was liable to be excom-

1 1 Sid. 113; 3 Keb. 433. 2 Hawe v Planner, 1 Wms. Saund. 10; Burton v Henson, 10 M. & W. 105; Worth v Terrington, 13 M. & W. 781. 3 1 Hawk. P. C. 139.; Cro. Jas. 367, 373; 1 Lev. 106. 4 2 Ed. 6. 5 2 Wynne, Eun. 256. 6 24 & 25 Vic. c. 100, § 36.

municated; and if he drew a weapon he was to have one ear cut off, or his cheek branded with the letter F.[1] It is also an offence to molest the clergyman during divine service, and punishable by fine of five pounds.[2] But if divine service is over, and he is merely collecting the offertory, this being no part of the service, any one obstructing does not offend against this particular statute, whatever other redress there may be.[3]

Assault to stop persons fighting.—Where persons are engaged in an affray, which in strictness of law is defined as a fight in a public place between two or more persons, to the terror of the queen's subjects, anyone of the public who is a bystander may justifiably assault one of the parties in order to cause a cessation of the fight, provided always in this, as in other cases, that he use no greater force than is necessary to procure the only result which should ever be the object of his interference, namely, the preventing any repetition of the affray.[4] And to prevent a third party being attacked, or a dog being incited to bite, is also a good cause for such interference.[5] Yet, lest such interference should be misconstrued by the parties engaged, such bystander should be careful first to intimate his object to the party whom he seeks to restrain.[6] But mere quarrelsome words or abusive language will not amount to an affray so as to justify the use of force. The sound and fury of words must be left to spend themselves in the air, and do not justify the arrest of the person who volleys them forth.

Assault in defence of possession of property.—Not only does the law justify an assault, if it is committed without excess in self-defence, or in defence of a wife, child, or relative, and in situations already noticed, but the same justification extends to assaults committed in defence of one's peaceable possession of his lands or goods. The exclusive possession of one's property is of the highest regard in the eye of the law, and to deprive the owner of

[1] 5 & 6 Ed. VI. c. 4, § 3. This was repealed in 1829; 9 Geo. IV. c. 31; 23 & 24 Vic. c. 32, § 5. [2] 23 & 24 Vic. c. 32, § 2. [3] Cope v Barber, 41 L. J., M. C. 137. [4] Noden v Johnson, 16 Q. B. 218; Timothy v Simpson, 6 C. & P. 500. [5] Griffin v Parsons, Selw. N. P. 27; 1 Hawk. c. 60, § 23. [6] 1 East. P. C. 306; Fost. Cr. L. 310.

this possession by force is a wrong of so odious and urgent a character, that the law sympathises with a man who feels excited and who resorts to force to prevent such possession being interfered with. If there is not a colour of right or claim on the part of the aggressor, the attempt in case of goods is nothing less than an attempt to steal. But there are many mixed cases, where there may be no such evil disposition as felony presumes, and yet there may be such a flagrant contempt of the ordinary remedies which the law supplies, that the aggressor is viewed as only invoking the punishment he deserves by provoking his neighbour over much. If there is a dispute between them the law is open to the complainant; but no code of law could consistently tolerate an appeal to violence as the solution of such dispute except in rare cases, for the peculiar triumph of law is to supersede all violence by leaving such solution to the calm neutrality of a judge. In all cases, therefore, where a person is in peaceable possession of land or goods, either as owner or representing the owner, and a stranger, without the warrant of any legal process, seeks to dispossess him, force may be used to prevent the aggressor carrying his point.[1] The assault in such a case is viewed as a necessary consequence of the unjustifiable interference with the possessory right, and so is in itself justifiable.[2] And though at one time it was thought that a man was justified in assaulting another only to retain or defend possession of his goods, but could not break the peace in order to regain possession, he is now held justified also in using force to regain possession of them.[3] It is the same as regards the possession of land, for where a breach of the peace is committed by a freeholder, who, in order to get possession of his land, assaults a person wrongly holding possession of it against his will, though the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. He may be justified in entering on his land, even though in so doing a breach of the peace is committed.[4] If the owner were compelled by law always to seek redress by

[1] Jackson v Courtenay, 8 E. & B. 8. [2] Roberts v Taylor, 1 C. B. 117. [3] Blades v Higgs, 10 C. B., N. S. 713. [4] Harvey v Bridges, 14 M. & W. 442; 1 Exch. 261; Lows v Telford, 45 L. J., Exch. 613.

action for a violation of his right of property, the remedy would be often worse than the mischief, and would aggravate the injury instead of redressing it.[1]

In defence of property moderation of assault is essential.—When one is said to act in defence of his land or goods, this includes the protecting of them against wilful injury or destruction as well as against mere acts of trespass. But, as has been said, one ought not to begin with striking. The law allows one, either in defence of his person or possessions, first to lay his hand on the adversary, and then to say, that, if any further mischief ensue, it will be in consequence of the adversary's own act; and then the battery will follow from the interference.[2] And yet a previous request to desist is not necessary when force has been already used.[3] And it must never be forgotten, that, in this as in other cases of resorting to force against a third party, moderation must be observed, and no more force used or pain inflicted than is reasonably necessary to defend the property and maintain the *status quo.*[4]

Assault in ejecting stranger from house or land.—It often happens, that disputes, not connected in any way with the title to lands, arise between the person in possession of a house or land, and a stranger or friend, who, with or without permission, has entered upon the premises. In judging of the mutual rights of the parties to remain, the first point to be ascertained is, who is for the time being the occupier of the premises, for what is commonly called the occupation of a house or land is only another name for the legal right to exclusively possess the premises for a definite term or during the will and pleasure of the true owner. In such a state of things, part of the absolute ownership, which consists in the exclusive right of possession, has become vested in the tenant or occupier, and, so long as such occupation lasts, the occupier is as much the entire master of the premises, and can dictate who shall come or go upon the premises, as if he were the absolute owner. The right of occupation therefore implies the

[1] Blades *v* Higgs, 10 C. B., N. S. 721. [2] Per Lawrence J., Weaver *v.* Bush, 8 T. R. 78. [3] Ibid. Polkinghorn *v* Wright, 8 Q. B. 206; Green *v* Goddard, 2 Salk. 641. [4] Cockroft *v* Smith, 11 Mod 43; 2 Salk. 641; Tullay *v* Reed, 1 C. & P. 6; Gregory *v* Hill, 8 T. R. 299.

absolute right to exclude third parties and forbid them to remain on the premises; and whoever is upon the premises remains solely by the will and pleasure of the occupier, who can, however, at any moment revoke such pleasure with or without reasons given. As between himself and all others, his will and pleasure is the sole rule by which their right to be on the premises is governed. Though they are peaceably there, that is to say, having entered by his express or implied permission, still if at any moment he chooses to revoke that permission and he requests them to leave, they are bound to go, and are in the eye of the law trespassers from that moment. And it makes no difference whether such third parties may have had some contract with the occupier, which included a permission to them to remain for the purposes of such contract; the utmost that can result from this is, that on breach of the contract the occupier will be required to pay damages. But the occupier's inherent and absolute right to order any person to leave his premises remains unaffected, and however harshly or wrongfully he may act, the law will not inquire into his motives. The parties must leave on his request, and if after such request they refuse peaceably to depart, he may use force just sufficient and no more to expel them from the premises. But before force is resorted to, care must be taken in all cases first to request the party to leave peaceably.[1] Thus a shopkeeper, though in a certain sense always inviting the public to enter and purchase, may, nevertheless, at any moment call on his customer to leave.[2]

Assault in disputes as to possession of real property.— And it is equally a rule of law that in all disputes where one is in possession and another seeks possession though not employing any force, the former cannot lawfully begin to use force to repel, until he has first requested the latter to desist in his attempt. If after such request the latter still insists, he may be lawfully assaulted with less or greater force, proportioned to the need of getting rid of him. And the cardinal rule in such a case is, to use no more force than is necessary to overcome the resistance. If one uses more force than is absolutely necessary, he renders

[1] Tulley v Reed, 1 C. & P. 6.
[2] Timothy v Simpson, 6 C. & P. 500.

himself responsible for all the consequences of the excess. Thus, if a man comes on my land, I cannot lay hands on him to remove him until I have desired him to go off. If he will not depart on request, I cannot proceed immediately to beat him; but must endeavour to push him off. If he is too powerful for me, I cannot use a dangerous weapon, but must first call in other assistance.[1]

It is to be borne in mind that the legality of the conduct of persons peaceably defending property does not always turn on the strict legal rights subsisting in that property. If a person is in peaceable possession of property which he believes to be his own, or at least claims as such, or claims at least in possession, he is not to be dispossessed by force even by him who may turn out to be the rightful owner and entitled to possession. The ownership is not to be confounded with the possession, for a tenant may be rightfully entitled to possession as against the owner of the reversion himself, who in such a case will not be entitled to possession till the present occupier's term has come to an end. Therefore the true criterion of whether one who holds possession of property can use force to defend such possession is not solely that in strictness of law he is entitled to such possession, but the main test is as to his being for the time in peaceable possession. If he has no right to continue in such possession, the owner must resort to the legal remedy appropriate to his case, and can rarely use force to recover such possession even of what is his own; at least if he does so, he may be opposed with still greater force, and must take the consequences. Yet there are many cases, where the possessor having not a colour of title to maintain his possession, and the real owner having given him no colour of acquiescence, may be ejected with force, and even though a breach of the peace is committed thereby. It was indeed once thought that if one is in actual possession of a house or premises, and another is rightfully entitled to the immediate possession, the latter cannot justifiably use force to recover the possession unless he can do so without a breach of the peace. It is true, that, if he use force and commit a breach of the peace, he is always liable for the assault.[2] And it

[1] Per Best, J., Ilott v Wilkes, 3 B. & Ald. 317. [2] 5 Rich. 2, c. 7 Newton v Harland, 1 M. & Gr. 660; 1 Sc. N. R. 474.

was always admitted that if a squatter or mere trespasser, who had no title to the possession, has, whether by accident or by the contrivance of the rightful possessor, left the premises vacant, the latter may then lawfully enter with or without force, and when the squatter returns may rightfully defend his newly-regained possession against such squatter, and use the necessary force and no more for that purpose and to that extent.[1] And the general rule is, that, if a freeholder entitled to possession finds one in possession who has no right as against him, he may use force to obtain the possession; and though he may commit an offence for which he may be punished, yet he is entitled to keep the possession so won, and the ejected person cannot maintain any civil remedy.[2] There may be an offence punishable criminally, but that will not affect the rightfulness of the acquired possession.

Turning out trespasser with assistance of constable.—It frequently happens, that the occupier of a house, in desiring to turn out an unwilling guest, visitor, or trespasser, calls to his assistance a constable. It is true that the constable in such a case is often requested, and if so it is his duty to attend as a spectator, and on the ground that a breach of the peace is likely to be committed. He may on request assist in expelling the intruder; but in so acting the constable has no other or greater power than any other person acting at the occupier's request. He may be a convenient witness in the event of future proceedings, but unless some breach of the peace occurs in his presence on the part of the intruder, the constable has no right to take such intruder into custody. By refusing to quit the premises, such intruder may render himself liable to a civil action, but he commits no crime by merely remaining longer and giving more trouble and annoyance than he ought to do. If, without being first struck, he strike the occupier, he may then be apprehended by the constable and taken before a justice and charged with an assault. But until such wrong is committed, all that the constable can justifiably do is merely to assist the occupier in pushing out the intruder, using no more force than is necessary; and if the intruder's conduct is such as reasonably appears

[1] Browne v Dawson, 12 A. & E. 629. [2] Harvey v Bridges, 14 M. & W. 442; 1 Exch. 261., Jones v Chapman 19 L. J. Exch. 456.

likely to lead to an immediate breach of the peace, the constable may then, and not before, apprehend such intruder for such conduct, and charge him with an assault, or the intruder may be bound over to keep the peace.[1]

Assaults in prize-fighting.—Though the essence of an assault is its being committed against the will of the assaulted, yet this element is wanting in the case of a mutual fight between two persons with weapons or without. In such cases, if one sue the other for the assault, leave and licence cannot be pleaded in defence, because the law views such a practice as illegal, and any licence founded on it is void.[2] It is true the damages in such a case would be small if the remedy be by action, and the punishment small if the remedy be by indictment. Prize-fights however are frequently brought about, and lead sometimes to charges of murder or manslaughter, and on that account will be noticed under those heads of law. Even in their mildest form, these fights involve all the spectators in the common guilt of committing an assault or breach of the peace. And on that account, if one of the combatants strike a bystander in the heat of the quarrel, he will be liable to an action, though the damages recovered might be small on account of the surrounding circumstances.[3]

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It is also a fundamental rule, that in all cases, other than arrest for felony or treason, or such indictable offences as require no warrant to authorise the arrest, the constable must, at the time of the arrest, have the warrant in his personal possession ready to be produced and shown to the party arrested. The law is tender of the liberty of all men, and no one is bound, in the cases last mentioned, to surrender his person to the custody of another, except when some lawful warrant is shown, which puts all doubt as to the legality of the cause of arrest at an end. Thus, an arrest for disobeying an order of justices or other like offence may be authorised by statute when a warrant of a justice of the peace is obtained: but in such cases it is not enough to justify the actual arrest, that a warrant has been actually obtained. It is further necessary that it be forthcoming for the inspection and satisfaction of him whose liberty is to be infringed, and who may want to know why his liberty is infringed. And if the warrant is not produced on request, the party assaulted may resist

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himself responsible for all the consequences of the excess. Thus, if a man comes on my land, I cannot lay hands on him to remove him until I have desired him to go off. If he will not depart on request, I cannot proceed immediately to beat him; but must endeavour to push him off. If he is too powerful for me, I cannot use a dangerous weapon, but must first call in other assistance.[1]

It is to be borne in mind that the legality of the conduct of persons peaceably defending property does not always turn on the strict legal rights subsisting in that property. If a person is in peaceable possession of property which he believes to be his own, or at least claims as such, or claims at least in possession, he is not to be dispossessed by force even by him who may turn out to be the rightful owner and entitled to possession. The ownership is not to be confounded with the possession, for a tenant may be rightfully entitled to possession as against the owner of the reversion himself, who in such a case will not be entitled to possession till the present occupier's term has come to an end. Therefore the true criterion of whether one who holds possession of property can use force to defend such possession is not solely that in strictness of law he is entitled to such possession, but the main test is as to his being for the time in peaceable possession. If he has no right to continue in such possession, the owner must resort to the legal remedy appropriate to his case, and can rarely use force to recover such possession even of what is his own; at least if he does so, he may be opposed with still greater force, and must take the consequences. Yet there are many cases, where the possessor having not a colour of title to maintain his possession, and the real owner having given him no colour of acquiescence, may be ejected with force, and even though a breach of the peace is committed thereby. It was indeed once thought that if one is in actual possession of a house or premises, and another is rightfully entitled to the immediate possession, the latter cannot justifiably use force to recover the possession unless he can do so without a breach of the peace. It is true, that, if he use force and commit a breach of the peace, he is always liable for the assault.[2] And it

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to any extremity and at all hazards in defence of his freedom, and that wholly irrespective of whether there may or may not be good cause for a warrant.[1]

Remedies for assault generally.—An assault is a violation of legal right, which has this remarkable feature, that the assaulted person has usually three alternative remedies. The motive of an assault is of somewhat ambiguous character. It is seldom purely malicious, and is more frequently the result of sudden passion or anger, and thus has little of that settled malice which is the usual ingredient of crime. It is also usually followed rather with insult than pain, and so a criminal punishment of a severe kind is not called for. Yet some satisfaction is due to wounded feelings, or to that moderate pain which usually results. There being much variety in the attendant circumstances, the law assigns damages by way of action as one remedy, or in the more serious cases, an indictment. But both these remedies are tedious, and hence there is a third remedy of a summary and expeditious character, which is administered through the intervention of justices of the peace, who have power either to fine or to imprison the offender.[2]

Punishment of assault by justices of the peace.—When it is deemed suitable to resort for a summary remedy to justices of the peace, they may hear a complaint by or on behalf of the party aggrieved, for any unlawful assault or battery; and if the charge is proved, they may commit the defendant to the common gaol or house of correction, with or without hard labour, for a term not exceeding two months. Or the justices may merely impose a fine not

[1] Galliard v Laxton, 2 B. & S. 363; Codd v Cabe, 45 L. J., M. C. 101.

[2] This notion of treating an assault as partly a civil and partly a criminal offence is by no means modern. Solon was said to have made a great improvement in the law of Athens when he allowed third parties to prosecute for assaults or personal injuries, for thereby it was said he gave all an interest in enforcing the law.—*Plut. Sol.* And this was only another way of saying that he made assault punishable criminally as well as civilly. And a glimmering of this state of the law soon arises even among barbarous tribes, for among the Kaffirs when an assault is committed, the chief of the tribe prosecutes and gets his fine, the impressive maxim being, that no man can eat his own blood.—*Maclean's Kaffirs*, 35.

exceeding, together with costs, five pounds; and failing payment of such fine, then the defendant may be imprisoned with or without hard labour for two months, unless the fine and costs be sooner paid.[1]

It is to be observed, that, though an assault may be treated as an indictable offence, and so may be prosecuted by any person, yet in cases before justices of the peace, the complaint must be made "by or on behalf of the party aggrieved," otherwise the justices cannot entertain it. Where children or idiots are assaulted, it is reasonable to allow the complaint to be made by a parent or guardian, having the care of the person assaulted; but in other instances, if a mere stranger interfere, and the assault is not an aggravated one, as is noticed in the next paragraph, the proceeding should be by indictment.

Justices punishing for assaults on women and children.—Where the assault is an aggravated assault, by which is meant an assault or battery made upon any male child under fourteen, or upon any female of whatever age, and whether the complaint is made on behalf of the party aggrieved or otherwise, the justices may in like manner hear and decide the case, if in their opinion the assault cannot be adequately punished as a common assault. And if the aggravated assault is proved, the justices may imprison the offender for six months with or without hard labour, or may impose a fine of twenty pounds, and failing payment, a like imprisonment. And over and above this punishment, they may order the offender to enter into recognizances to keep the peace, and be of good behaviour for six months after the expiration of the sentence.[2]

Though a common assault can only be punished by justices, when the party aggrieved or some one on his behalf complains, it is thus otherwise when the assault is committed on a child under fourteen, or on a female. In the latter case any person whatever may prefer the complaint, and thereby procure the punishment, though, as will be seen, the punishment may not be final, unless the party assaulted is the complainant.

Justices are to give certificate in assault cases.—The justices may not only decide cases of assault, but their decision is declared to be final and conclusive in several

[1] 24 & 25 Vic. c. 100, § 42. [2] 24 & 25 Vic. c. 100, § 43.

instances. The legislature has enacted that if the justices, on the hearing of the case of assault and battery on the merits, whether it is a common or an aggravated assault, and when the complaint has been made by or on behalf of the party aggrieved, shall deem the offence not to be proved, or to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate, stating the fact of such dismissal, and shall deliver the same to the defendant.[1] The effect of the certificate in further litigation between the parties will be immediately seen, but it is important first to state how and when the certificate may be obtained.

This certificate the justices have no discretion to refuse in the event of the dismissal on either of the grounds specified. They are indeed not bound to grant it immediately, that is, on the same day as they dismiss the complaint; but may do so within a reasonable time, which has been interpreted by the courts, according to circumstances, to include several days.[2]

It is also to be observed, that such a certificate is only to be given after a hearing on the merits, and if the complaint was preferred by or on behalf of the party aggrieved. Accordingly if the prosecutor has, after laying the information or after the serving of the summons, changed his mind and retired, or does not appear before the justices to give any evidence, they can only dismiss the summons, but cannot grant this certificate, for in those circumstances there can have been no hearing on the merits. And this enactment tends to prevent collusive proceedings taken for the purpose of screening the offender from other punishment. And if the complaint has not been made by the party aggrieved, but by a stranger, then the justices are neither authorised nor justified in granting the certificate.

Effect of justices' decision in assault cases.—The effect of the certificate already described being granted by the justices is, that the defendant shall be released from all further or other proceedings, civil or criminal, for the same

[1] 24 & 25 Vic. c. 100, § 44. [2] Hancock *v* Somes, 1 E. & E. 795; Coster *v* Hetherington, 1 E. & E. 802. And the certificate should state on the face of it, on which of the grounds the complaint was dismissed.—Skuse *v* Davis, 10 A. & E. 635.

cause.[1] Hence, as a general rule, neither an indictment nor an action can be resorted to after the adjudication of justices. And not only is a defendant discharged by a certificate of justices from all other punishment, but the same effect is produced if he has been convicted and has paid the whole amount adjudged to be paid, or has suffered the imprisonment, with or without hard labour, which was awarded.[2]

Though the justices' decision on the merits has thus been declared to be a bar to other proceedings for the same cause or assault, there is some difficulty in interpreting and applying this general rule, owing to the vagueness of the words. There is a general maxim of the law, that no person should be twice vexed for the same cause, and this may be the basis of the above enactment. In one case, after a dismissal by justices of a summons for assault, the assaulted party, finding his injury to be more serious than was at first apprehended, indicted the assailant, but the indictment was held to be barred by the justices' certificate.[3] In another case the assailant had been convicted by justices of the assault and had suffered imprisonment and hard labour, and afterwards, the assaulted party having died in consequence of the assault, the assailant was indicted and tried for manslaughter; and the court held the previous conviction for assault was no bar to the indictment, because the second was substantially a different accusation, and not one for the same cause.[4]

Justices may in some cases refuse to decide on assaults.— But though it is incumbent on justices of the peace, when their jurisdiction is invoked in cases of assault, to adjudicate upon the complaint, there are some circumstances in which they have a discretion to abstain from doing so, and, instead of themselves deciding, they may remit the case to the more solemn and formal remedy of an indict-

[1] 24 & 25 Vic. c. 100, § 45. [2] Ibid. [3] R. v Elrington, 1 B. & S. 688 ; R. v Stanton, 5 Cox, C. C. 325.

[4] R. v Morris, L. R., 1 C. C. R. 90. But where a wife was assaulted, and charged the assailant, who was fined by justices, and the husband afterwards brought an action for the loss of the wife's society and assistance during the time of suffering from the assault, this action was held barred.—Masper v Brown, L. R., 1 C. P. Div. ; 45 L. J., C. P. 203.

ment. Thus when they find the assault or battery had been accompanied by any attempt to commit felony, or they are of opinion that from any other circumstances the same is a fit subject for a prosecution by indictment, they shall abstain from any adjudication and treat it as a case over which they have no jurisdiction.[1] The justices moreover will, whether they wish to decide or not, be deprived of the jurisdiction over cases of assault, where any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein, or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice.[2] The reason of this enactment is, that as justices are not usually trained to the legal profession, and intricate questions of law may be mixed up with the assault and its circumstances, it is better that they should at once decline to adjudicate, and remit the parties to their other remedies. Injustice can rarely be done by this course, because there are always skilled tribunals having a concurrent jurisdiction, and before which the most intricate problems of law can be solved. We have already seen that an assault is justifiable in many cases in defence of one's property or possession, and whether such assault was justifiable or not in any particular case, may depend entirely on questions of real property law, which only the superior courts can satisfactorily determine. This mode of ousting the justices of their jurisdiction, as it is called, is not peculiar to cases of assault, but equally extends to the adjudications of all inferior courts of summary jurisdiction, whether the statute creating the jurisdiction expressly states this exception or not, provided always it do not expressly give such jurisdiction. Thus in cases of malicious injury to property, in trespass in pursuit of game or fish, the same mode of depriving justices of jurisdiction applies.

The application of this rule by justices however requires considerable nicety of judgment, for the question whether the defendant *bonâ fide* claims exemption from their jurisdiction, on the ground that title to lands is involved, is a preliminary question to be decided, and for the purpose of so deciding it some facts may require to be proved, and the circumstances should be such that a legal ground for

[1] 24 & 25 Vic. c. 100, § 46. [2] Ibid.

such a claim may reasonably arise. If the justices make a mistake, and overrule the objection of title, their decision may be reviewed by the Queen's Bench Division on an application for a *certiorari*. So that they are not the exclusive judges of whether they should or should not exercise their jurisdiction in a particular case where an objection of title is raised. And they cannot get over the difficulty by finding there was an excess of jurisdiction, for if there was a *bonâ fide* question of title involved, though an excess of force was used, the whole remedy must be remitted to the High Court of Justice, and not disposed of by an inferior tribunal.[1]

Maximum of punishment by justices in assault cases.— In all cases where justices of the peace, in a summary manner, convict a person of assault, the punishment is either a fine or imprisonment, according to the discretion of the justices. But the imprisonment cannot in cases of common assault exceed two months, or in cases of aggravated assault on children and women, exceed six months. It is true that if a fine be imposed in the first instance, and it be not paid either immediately or within the time named, then the offender may in substitution be imprisoned for six months. And beyond these two kinds of punishment the justices may further, in aggravated assaults, bind over the offender to keep the peace, and be of good behaviour for six months more after the expiration of the sentence.[2]

Though such is the law as regards common assaults and aggravated assaults, when punished by justices in a summary way, there are some classes of assaults in which a higher punishment is authorised. Thus, in case one shall beat or use any violence or threat of violence to any person with intent to deter or hinder him from buying, selling, or disposing of corn or potatoes, in a market or public place, or in the way towards market, or with intent to compel a sale or purchase of such grain, then the only punishment a justice can award is not a fine, but imprisonment, which is not to exceed three months.[3] And the same punishment is inflicted on those who unlawfully, and

[1] R. v Pearson, L. R., 5 Q. B. 237.
[2] 24 & 25 Vic. c. 100, §§ 42, 43.
[3] 24 & 25 Vic. c. 100, § 39.

with force, hinder or prevent seamen from working at their trade. The urgency of these trades seems to be the reason for singling the assaults out for somewhat more severe punishment.[1]

Justices cannot give compensation for assault.—The justices have no power, in addition to a fine or imprisonment, to order payment of damages to the injured party, though the contrary was the ancient law of Wales, which enabled damages, besides the other punishment, to be awarded, according to the quality and quantity of the offence.[2] The justices, however, may award the costs of attendance before them to be paid by either the complainant or the defendant, according to the result of the proceeding.

Some assaults treated as misdemeanours.—There are other assaults besides the foregoing, which are treated as misdemeanours, and indictable only, being too serious to be disposed of summarily. Thus, to obstruct or prevent by force or threats any clergyman or dissenting minister from celebrating divine service, or officiating in a church or chapel, or in the burial of the dead, or to strike or offer violence to, or to arrest under civil process, any clergyman or dissenting minister while engaged in or about to engage in these sacred duties, or while returning from such duty, is a misdemeanour punishable with two years' imprisonment, with or without hard labour.[3] And to assault, strike, or wound a magistrate, officer, or other person, while preserving a vessel in distress, or stranded, or the shipwrecked goods, is a misdemeanour punishable with penal servitude or imprisonment.[4] And an assault with intent to commit a felony is also a misdemeanour, punishable with two years' imprisonment.[5]

Assaults arising out of combinations or strikes of workmen in trade disputes are also treated as misdemeanours and punished with two years' imprisonment. It was shown in an earlier chapter, when treating of threats and molestations, that an act done merely in furtherance of a trade dispute is not indictable as a conspiracy, unless the act when done

[1] 24 & 25 Vic. c. 100, § 40. [2] Stat. Wall., 12 Ed. I. c. 11.
[3] 24 & 25 Vic. 100, § 36.
[4] 24 & 25 Vic. c. 100, § 37. Penal servitude from five to seven years, or imprisonment for two years with or without hard labour.
[5] 24 & 25 Vic. c. 100. § 38.

by one person would be a crime.[1] But that enactment does not materially conflict with the present enactment, which punishes thus severely an unlawful assault in pursuance of an unlawful conspiracy to raise wages or an unlawful combination. So assaults on constables or peace officers in the execution of their duty are also deemed misdemeanours.[2] A later Act, of 1870, however, declares an assault on a constable to be an offence which may be tried summarily by two justices, who may on conviction imprison the offender for six months, or fine the offender twenty pounds, and in default of payment imprison him six months.[3] There was also a penalty recoverable before justices of five pounds for assaulting or resisting a borough constable;[4] of twenty pounds for assaulting or resisting a special constable,[5] or a county constable.[6] But these prior statutes seem to be partly repealed by the latest statute above mentioned.[7] And this is only one of many examples of confusion pervading the statute book.

Assaults on parents treated as common assaults.—And here may be noticed a peculiarity of ancient and eastern codes which punished with unusual severity an assault upon a parent. Though assaults upon clergymen, upon magistrates at a shipwreck, and some others are treated severely, yet an assault on a parent is not singled out for excessive punishment, except so far as the justices have some discretion in varying punishment in all cases.[8]

[1] 38 & 39 Vic. c. 86, § 3. See *ante*, p. 223.

[2] Whosoever shall assault, resist, or wilfully obstruct a peace-officer in the due execution of his duty, or any person acting in aid of such officer, or whoever shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, shall be guilty of a misdemeanour, punishable with two years' imprisonment.—24 & 25 Vic. c. 96, § 38.

[3] 34 & 35 Vic. c. 112, § 12. [4] 5 & 6 Wil. IV. c. 76, § 81. [5] 1 & 2 Wil. IV. c. 41, § 11. [6] 2 & 3 Vic. c. 93, § 8. [7] 34 & 35 Vic. c. 112, § 12.

[8] The Mosaic code directed the punishment of death against those who assaulted or cursed their parents.—*Exod.* xxi. 15, 17. And Plato himself directed that they should be put to death for an attempt to kill parents, though unsuccessful, and should be banished for life for striking them; and any freeman who should eat or drink with, or even touch such offenders, should be forbidden to enter the temple or the market-place until he should be purified.—*Plato, De Leg.*

Assault in a court of justice.—There is still one kind of assault that requires special notice. An assault in a superior court of justice was once punishable with cutting off the right hand, and forfeiture of goods and lands for life.[1] In 1631 a prisoner, at Salisbury assizes, having thrown a brickbat at the judge after receiving his sentence, he was indicted and tried at once, and after seeing his right hand cut off and fixed to a gibbet, was himself hanged in the presence of the court, all being done *uno flatu*. And in a case in 1799, being an information for riot and striking in the assize court, Lord Kenyon said he had some doubts whether the court must not order amputation; but fortunately, before finally deciding this point the Attorney-General cautiously entered a *nolle prosequi*.[2] And now this old law may be said to be impliedly repealed by the later enactments applicable to all assaults, and which do not except those committed in courts of justice.

Criminal remedy for assault by information.—The other criminal remedies in case of an actual assault are information and indictment. The latter is the ordinary and universal remedy; the former is exceptional, and is in practice confined to cases which involve more or less directly some public duty or some scandal connected with the administration of justice, or some flagrant outrage on the liberty of the subject. An information is moreover not a remedy open to an individual except by leave of the Queen's Bench Division, which exercises a discretion in allowing it, and usually refuses it, except in signal and flagrant cases. Thus a criminal information for an assault has been deemed a fit remedy, where a magistrate committed the assault.[3] And a criminal information was held a right course to take, even though the prosecutor had at first given the defendant into custody, but failed to press

b. ix. See also *post*, Ch. vii. And in China the striking of a parent or grandparent was a capital offence, and even to use abusive language to him was criminal.—*Staunton's Code*, 346, 357. In such cases also Bentham recommended that, in addition to the ordinary punishment, the delinquent should undergo a penance more or less public upon the stool of repentance, with his hands tied above his head, and an inscription stating his offence.—1 *Benth. Works*, 165.

[1] 1 Hawk, c. 21, § 3; 4 Bl. Com. 125; 1 East. P. C. c. 8, § 3.

[2] R. v Thanet, 27 St. Tr. 845.

[3] Anon. 2 Barnard. 138.

the charge, owing to his, on second thoughts, preferring the higher remedy.[1] Such also are cases where a malicious impressment had been made by a captain of a sloop of war;[2] and for a challenge to fight;[3] though if the prosecutor be the first to send the challenge, he will be left to his indictment.[4] When this criminal information is granted by leave of the court, the party is tried in the same manner as if it were an indictment, an information being nothing else but an indictment commenced by an officer of court and not by a private prosecutor. The preliminary steps only are different, but the conclusion of the proceeding is substantially the same.

Indictment for assault.—An indictment is the remedy for an assault in those cases, upon which justices in their discretion, and for the reasons already stated, decline to adjudicate; and while an action at law is also competent, yet an indictment is reserved as the appropriate remedy for the more serious cases. It is true that no precise line of demarcation can be drawn between assaults actionable and assaults indictable; and it lies with the injured party to treat the injury in either way; or, to speak more correctly, he alone may decide either to sue or to indict, while others besides himself may initiate a prosecution by indictment, if so inclined.

When an indictment has been resorted to as a remedy for assault and a verdict of guilty of a common assault is given, the court may punish the offender with one year's imprisonment with or without hard labour; and if the assault has occasioned bodily harm, the court may award as punishment penal servitude for five years, or imprisonment for two years, with or without hard labour.[5] Or the court may impose a fine on the offender, either in addition to, or in substitution for, the above imprisonment, and in addition require him to enter into recognizances with or without sureties to keep the peace and be of good behaviour.[6] And whenever a count for a misdemeanour contains a charge of assault with circumstances of aggrava-

[1] R. v Gwilt, 11 A. & E. 587; 8 Dowl. 476; R. v Holloway, 8 Mod. 283. [2] R. v Webb, 1 W. Bl. 19. [3] R. v Dove, Comb. 477; R. v Chappel, 1 Burr. 402; R. v Younghusband, 4 N. & M. 850. [4] R. v Hankey, 1 Burr. 316; R. v Larrieu, 7 A. & E. 277. [5] 24 & 25 Vic. c. 100, § 47. [6] 24 & 25 Vic. c. 100, § 71.

tion, the jury may find the defendant guilty of a common assault, and acquit him of the circumstances of aggravation.[1] It is also competent for the court when a person is convicted on an indictment for assault to order him in addition to any other punishment to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as shall be reasonable; and for non-payment of this sum an imprisonment of three months may be awarded in addition to any other imprisonment.[2]

Remedy for assault by action of damages.—As already stated, a person assaulted has a civil as well as a criminal remedy, and they are deemed by the law to be identical in their origin. Yet where a person has brought an action for an assault, and also preferred an indictment for the same, the court in which the action is brought will not compel him to elect as to his remedy, for they are treated as quite distinct.[3] But the court has refused after conviction on an indictment for an assault to sentence a party while an action was pending.[4] When an action for assault is brought, it proceeds in the same way as other actions, but there is a peculiarity attending the amount of damages recoverable, which marks it out from most other actions. The issue involved in most instances being entirely one of damages, the jury who decide necessarily enjoy a greater freedom in fixing the amount of such damages—as they have also for a like reason in an action for false imprisonment. There being no definite lines within which the jury can be confined, they surrender themselves usually to the impression of the moment, derived from a vivid description of the conduct and relative situation of the two parties before them, and the surrounding circumstances, and hence they are masters of the situation. And it is so difficult at all times to put a money value on an insult or a personal attack, that the courts are slow to interfere with the exercise of discretion on the part of a jury. It has accordingly been laid down as a rule that, when a jury assess a sum as damages by way of reparation for an assault, that amount will not be

1 R. *v* Oliver, Bell, C. C. 287; R. *v* Yeadon, 1 L. & C. 81.

2 24 & 25 Vic. c. 100, § 74. These costs may be levied by distress and sale of goods, § 75.

3 Jones *v* Clay, 1 B. & P. 191.

4 R. *v* Mahon, 4 A. & E. 575.

interfered with by any court except the damages are grossly excessive, or clearly founded on a mistaken or improper view of the subject-matter.[1] What is or is not in this view grossly excessive damages is a question equally vague with the other, yet the court takes upon itself so far to review, or rather supervise, the conduct of a jury as to be able to say what is or is not excessive or extravagant; and if the court deems it excessive it will often grant a new trial on that account.[2]

Finality of damages as remedy.—It is also a feature of this kind of action, that the reparation or redress sought for must be given by the jury once for all. They must look forward and consider the probable immediate consequences of the injury sustained, and form the best judgment on the matter they can, so as to give complete satisfaction and make an end of the litigation. The plaintiff cannot come a second time claiming damages for the same cause on the ground that consequences and injuries not at first foreseen have subsequently been developed. Thus where a blow was given on the head, and after action brought, and small damages recovered, it turned out that the skull had been fractured, and part of it came away, the plaintiff nevertheless was not allowed to bring a second action for this unknown and unexpected sequel.[3] And indeed this is only the same rule which is followed in actions for other wrongful acts.[4]

[1] Edgell *v* Francis, 1 Sc. N. R. 121; Huckle *v* Money, 2 Wils. 206.

[2] As DE GREY, C. J., said: "If two ordinary men should quarrel at an ale-house, and one should give the other a fillip upon the nose, and 1000*l.* should be given for damages, which is ten times more than both the parties are worth, such damages would be evidence that the jury had not acted with the deliberation that the administration of justice requires."—Fabrigas *v* Mostyn, 20 St. Tr. 176.

[3] Fetter *v* Beale, 1 L. Raym. 339, 692.

[4] Bonomi *v* Backhouse, 1 E. B. E. 657.

CHAPTER IV.

PROTECTION OF THE BODY AGAINST MALICIOUS, WILFUL, AND NEGLIGENT ACTS, WHICH KILL OR WOUND.

Murder the worst of human crimes.—Murder is the worst of all the crimes which one fellow subject can commit against another in a civilised community, being nothing less than the deliberate destruction of that life which it is one of the chief ends of the law to protect. Coke says that the life of man is of all things in the world the most precious.[1] Life is to most men the best of all the gifts of God, for which they would gladly give the whole world, and though the cultivated intellect can see things greater even than life, yet in the general level of humanity it is the one priceless treasure. The law fixes its standard of excellence, its standard of conduct, and of happiness, not for the select few, but for the whole mass. It learns which is the irreparable wrong not from the lips of martyrs, of heroes and enthusiasts, but from the speech of common men. It is in the protection of human life, therefore, against murder, that all the resources of the law might be expected to be put forth, and all the most consummate safeguards arrayed which its ripest wisdom can devise. Yet, strange to say, the law may be said here to be all but powerless. It relies entirely, not on anything it can itself do, but rather on the habits of self-restraint and the moral sense of the community, in order to fence round the life of each with invisible ramparts. The life of every man may be said to lie open to the mercy of each and all his fellow creatures every hour of his existence; and yet such is the self-control and the far-reaching circumspection

[1] 2 Inst. 30.

manifested by his neighbours, that all the transports of passion, all the jarring conflicts of self-interest, that visit the human breast, yield but seldom an occasion for any one of them being tempted to the dire extremity of taking another's life.[1] A few cases, nevertheless, occur, where all the motives of prudence and reflection, all the calculations of consequences are unavailing to stay the fatal blow, and when the deadliest crime known to the law, at least between subject and subject, is committed—that of one human being murdering another.

If murder is the earliest crime recognised.—Though murder is the most serious of all crimes known to the law, yet it by no means follows, that it is the first to make its appearance in the code of semi-barbarous communities. It obviously involves a more abstract idea than some other crimes, as, for example, larceny, for the savage mind would no doubt be more vividly impressed by the loss of some article of property, a bow, or an arrow, or a head of game, than any attack on human life; and indeed one can scarcely suppose savages taking away each other's lives for the mere gratification of malice, which is probably a refinement of civilised life involving considerable reach of reflection. Larceny, and probably adultery and witchcraft, are the crimes which present themselves first to any tribe or community emerging from barbarism. But whether it be sooner or later in becoming a recognised crime, murder must at a very early stage of society take up its place, and it must always ultimately stand at the head of all the wrongs done between man and man. Even the untutored Indian admits that all have a right to live, and that murder is wrong.[2]

Definition of murder.—Murder may be defined to be "the malicious killing by one human being of another human being, by some external or other means satisfactorily traced; and a malicious killing is a killing not justified either by self-defence, or under colour of any lawful conduct or business of the killer."

Judges have often expressed dissatisfaction with the definitions attempted of murder, because these necessarily

[1] "The law of England allows no man to value himself at such a rate, as if the blood of his neighbour were a fit sacrifice to expiate every mean and slight affront."—6 *St. Tr.* 780.

[2] 2 Schoolcr. Ind. 195.

refer to or assume knowledge of things extraneous, such as is implied when it is said to be a killing "without just cause or excuse," the chief difficulty then being as to what is a just cause or excuse. To know this requires, undoubtedly, long explanations and references to nearly all the lawful occupations of mankind. And yet all this must be known before anyone can comprehend fully what murder is, it being nothing else but the negation and antithesis of all these just causes and excuses for human conduct. Hence Foster, Hawkins, and Blackstone first treat of justifiable homicide and manslaughter, before beginning to explain what murder is; but even that arrangement little advances one's knowledge. The difficulty is inherent in the subject, and altogether ineradicable.

Analysis of definition of murder.—The foregoing definition suggests various difficulties in the terms used; indeed, at every turn in the law the natural obscurity of language is the leading obstacle to an understanding of the things meant. It will accordingly be necessary, in further clearing up such ambiguities as are unavoidable, to discuss somewhat in detail the leading elements of the definition. This will be best done by explaining what is a human being—what is meant by malicious—what by killing—what by external means—what by self-defence—and what by lawful conduct or business. Each and all of these terms and phrases will be found to imply various distinctions and qualifications necessary to be borne in mind by those who would clearly comprehend the law of murder. It is true that the crime of murder bears the name of treason, when the object of the murderer is the person of the king or queen of the realm, or the eldest son and heir for the time being, or some high functionaries of the government. But the law, as regards these, will be more appropriately treated under the respective heads of Government and Judicature, of which they are a necessary part, and in reference to which alone they are of special importance.

Murder means killing of a human being.—Murder is applied solely to the destruction of the life of a human being. And the crime is the same, whether the person murdered be rich or poor, male or female, old or young, a relative or a stranger, a wife or a husband, a parent or a child, the sick or the hale, a native or a foreigner, and, if slaves

existed, a freeman or a slave. The circumstances of each case and the relationship between the parties do not affect the crime itself, though they may to some extent influence a court in fixing the quantum of the punishment.

It may seem a truism to say that murder applies to all human beings, without distinction of person or race, and that the law guards human life from the first beginnings of infancy till the hour of natural death. But it is in this catholic and broad sense, that modern civilisation differs so widely from ancient and barbarous times. The law of civilisation tolerates no distinctions whatever—allows no paltering or equivocation, no refinements of intention or motive, no calculations as to final causes, no speculations as to the worthlessness of the life sacrificed. It is enough that the object of the crime has the semblance of humanity. Yet here it is, that ancient nations and barbarous tribes show how obtuse is the perception they have of this ultimate principle and infallible axiom of modern law, that every human being has a right to live. They seem to have had a vague idea, that murder was wrong as regarded some persons, but saw no harm whatever, and sometimes saw much merit, in disposing in that way of many classes of people for various reasons, and perhaps oftener for the want of any reason at all.

Murder of foreigners.—Barbarous nations, for example, are slow to see any harm in murdering foreigners and travellers, though they may be careful of their own people. With us all persons, whether foreigners[1] or not, are equally within the protection of the law; and if killed under circumstances which would make the crime

[1] The Thugs of Hindostan were an organised community of men who believed they had a divine mission to murder and rob all mankind, and they practised every kind of cruelty and treachery on innocent travellers. They had no particular spite or animosity against any of their victims, and were models of decorum in their private and domestic relations. But while in their own circle they were blameless, yet, having this divine mission, they felt bound to strangle and murder every person out of that circle who fell in their way, and this for the good of themselves and their families. This fraternity lasted 200 years, and was put down between 1818 and 1853.—*Hutton's Thugs.* An Asiatic tribe, which has bequeathed to us their own name of Assassins, were said to have considered it their vocation to go and cut the throat of any person, if ordered by their chief to do so.

murder as regards a natural born subject, it is equally a murder as regards an alien enemy found in this country and not killed in the heat of war.[1] And though outlaws and persons attainted of felony or in præmunire are subject to disabilities, and were once hunted and killed like wolves, they have long been entitled to the same protection against murder and all assaults as other persons.[2]

Origin of word murder.—It is to this barbarous notion as to the comparatively venial offence of slaying a foreigner, that we owe to some extent the very name of this crime. The word murder, "*murdrum*," has been generally explained to be the name given to a fine laid upon a township, in which a person unknown was found slain. The legal presumption then made was, that the unknown man was a Dane; but the fine was avoided by positive testimony that he was only an Englishman, the proceeding for that purpose being a presentment of Englishry. This jealous protection of the Dane, and afterwards extended to the Norman, was not finally removed till the 14 Edward III. But the old name of the fine was kept up as the name of the crime of murdering a human being.[3] And though this practice of presentment of Englishry in case of murder, which was once attributed to Canute, is now generally regarded as one of the innovations of the Norman Conquest, and which went out after Magna Charta,[4] yet the principle or notion on which it was based was nothing else than this, that the life of one race was more jealously to be protected than that of another, and that other lives were of little or no consequence in comparison.[5]

Murder of infants.—Where the murder is of a very young child, there is now no distinction in point of law

[1] 1 Hale, 433.

[2] Ibid. Before 5 Eliz. c. 1, persons attainted in præmunire had no protection against murder.—24 Hen. VIII. B. Coron. 197; 1 Hale, 497. So far back as 2 Ed. III. outlaws were protected against being killed.—*Co. Lit.* 128 b.

[3] 1 Hale, 447; 1 Stubbs, Const. H. 382; 14 Ed. III., St. 1, c. 4.

[4] 1 Stubbs, Const. Hist. 196, 382, 549; Laws, Hen. I., § 92; 14 Ed. III., St. 1 c. 4.

[5] The Salic Law allowed less composition to be paid for killing a Roman than a Frank or barbarian; but the laws of the Burgundians and Visigoths were said to be impartial.—*Montesq.* b. xxviii. c. 3.

between that and cases of adult persons. The broad principle is laid down, that whenever a child has been born, and has an independent circulation of the blood, even though the umbilical cord be not severed, so as to fulfil the description of a living human being, the killing of such child is murder.[1] It is true that in many cases where a child is killed at the time of birth it may be difficult to ascertain whether the child was born alive, and then killed, or was killed before it was finally separated from the mother, or during the act of separation. These questions are frequently so mixed up with other offences falling short of murder, and known under other names, as concealment of birth, and procuring abortion, and infanticide, that they will be more appropriately considered in a subsequent chapter under the head of "Variations in the Laws of the Person caused by Age."[2]

Murder of sick and aged persons.—And though the old and sick are treated as entitled, like the rest of their fellow creatures, to enjoy what life is in store for them, and it is murder to shorten their allotted span by an hour, if it can be made clear that the act was done maliciously, and had that effect, it is singular that so many barbarous tribes should have shown a callous and brutal disposition towards human beings arrived at those stages.[3]

[1] R. *v* Enoch, 5 C. & P. 539; R. *v* Wright, 9 C. & P. 754: R. *v* Sellis, 7 C. & P. 850.

[2] See *post*, Ch. ix. HALE regarded it impossible, according to the law of England, to treat the procuring or effecting of abortion either as murder or manslaughter. COKE leaned to the opposite view.—See *post*, Ch. viii.

[3] The Sioux Indians of North America and some African tribes bring up their children to view murder as the great object of ambition.—*Galbraith, Ethnol. Journ.*, 1869; *Burton's Africa*, 176. In Alaska old, sick, and useless persons are put to death, out of kindness and affection, by their relatives.—*Dall's Alaska*, 384. In Fiji, in Tahiti, and among the Esquimaux and the Missouri Indians, parents are killed or buried alive, whenever they are burdensome or disabled by sickness.—1 *Williams' Fiji*, 183; 1 *Ellis, Pol. Res.*, 365; *Parry's Three Voyages; Wilkes' Expl. Exped.* Among the Kaffirs, the Congos, and the Arrakanese, the sick and dying are taken to a thicket and exposed, or drowned, or tossed into the air. —*Maclean's Kaffirs*, 161; 6 *Univ. Mod. Hist.* 418, 469; 3 *Ibid.* 230. HERODOTUS said the Indians of the East, and the Essedonians, and Massagetes, killed and ate their sick.—*Herod.* b. i., b. iv.

Where murdered person is confidentially related.—Many ancient nations singled out from the common case those who murdered another who was confidentially related. Eastern nations as well as the ancients had an especial detestation for parricides, and for slaves who kill their masters, though it seldom dawned on their minds that masters could possibly murder their slaves. And though in modern times we make no distinction, but treat all murderers as on one level, our ancient law followed the traditions of their elders. By our old law, any mischief which one knowingly did or procured to be done to another while pretending friendship was deemed treason, and was punished sometimes with death, sometimes with loss of limb, with pillory or imprisonment, according to the nature of the case.[1] And among the Anglo-Saxons murder in a tavern was deemed an enormous crime.[2] And if murder was committed by any one who had been three days a guest, his host was bound to bring that guest to justice, or himself answer for the crime.[3] If a servant killed his master whom he had left, owing to a grudge contracted during the service; if a wife, after being divorced *a mensâ et toro,* killed her divorced husband; and if a clergyman killed the bishop who ordained him, or in whose diocese he was beneficed, or the metropolitan of such suffragan, or diocesan bishop, these were treated by the statute of 25 Edward III., c. 2, as crimes of petit treason, involving a higher punishment than felony. This distinction has long been abolished, and the sentence of burning passed on women convicted of petty treason as well as high treason was changed in 1790[4] into that of hanging, and this identity continues to the present day.[5]

The Medes bred a number of large dogs for the express purpose of devouring the bodies of the dying, as it was dishonourable to die in bed or to be buried in the ground.—*Bardesan, ap. Euseb.* The ancient Germans for several ages killed their old and sick.—*Christ. Hartnock, Pr. Antiq.* xiii.

1 Britt. b. i. c. 9. 2 Anct. Laws, Ethel. Eadr. 3 Anct. Laws, Hloth. Eadric. 4 30 Geo. III. c. 48. 5 9 Geo. IV. c. 31; 24 & 25 Vic. c. 100, § 1.

PLATO in his laws directed a murderer to be punished with death and refused burial. But in the case of one murdering his parent, or brothers, or children, the murderer was to be punished with

Mental capacity of murderer.—The malice, which is an ingredient of the crime of murder, implies that the party is in full possession of his senses and is able to discriminate between right and wrong. In general a lunatic, or idiot, or an infant under the age of discretion, is incapable of committing a crime, or rather is exempt from the usual punishment, by reason of his incapacity to know what he

death at an appointed place where three roads met, and to be cast out of the city naked, and the magistrates were to throw stones on his head, and thereafter cast his body, unburied, beyond the borders. —*Plato*, *De Leg.* b. ix. And a slave who killed his master in self-defence was treated as a parricide, which MONTESQUIEU says was a law contrary to nature.—*Montesq.* b. xxvi. c. 3. When a Roman was found murdered in his house, all the slaves under his roof at the time were first put to the torture, and if it was thought they had not done their best to defend their master, they were put to death. And Adrian mitigated this rule by allowing only those slaves to be killed who were near enough to prevent the murder. —6 *Univ. Hist.* 47.

Constantine, in restoring the old punishment of parricide which the Twelve Tables had ordered, laid down the law to be, that if any one hastened the fate of his parent, or son, or any the like relation, which goes under the name of parricide, whether he attempt it privately or publicly, he shall not be punished with the sword, or with fire, or with any other common death; but be sewed up in a sack with a serpent, an ape, a cock, and a dog, and thrown alive into the sea, that he might have no air to breathe whilst he lived, nor earth to receive him when he was dead.—*Cod. Theod.* lib. ix. tit. 15, leg. 1. The ancient *Egyptians* punished a parricide by laceration with sharp reeds, then by throwing him on thorns and burning him.—2 *Wilk. Anc. Egypt*, c. 8.

By the law of *China* the murder of a parent, grandparent, or uncle, or aunt, was a crime of the deepest dye, and ranked amongst offences of a treasonable nature. Even an attempt to kill was a capital offence. The murderer suffered death by a slow and painful execution. If the party murdered or attempted to be murdered was a more distant relative, the crime was also singled out for severer punishment than in ordinary cases.—*Staunton's Code of China*, 306. There was a saying in *Japan* that the same heaven could not cover a man and the murderer of his parent, master, or elder brother; and he could with impunity, on giving notice to the public authorities, kill such murderer.—*Dickson's Japan*, 256. And the slaying of a master was deemed a species of treason, and the murderer's family was wholly extirpated.—*Ib.* In Korea the wife who had killed her husband was buried alive up to the shoulders in a pit in a highway, and an axe was laid near her, and each passenger, except a nobleman, was bound to give her a stroke on the head.—7 *Pink. Voy.* 539.

does. Hence it is a usual defence to all indictments that the party charged was at the time in a state of mind which deprives him of all responsibility for his acts. As the non-liability of lunatics and others incapable of legal discretion is an incident of their status, and is not peculiar to any one crime, the distinctions as to the usual tests of soundness of mind are treated more appropriately under another head. And the defence of mental incapacity is to be carefully distinguished from mere ignorance or want of education and knowledge, for the law presumes that all alike, whether educated or uneducated, sufficiently know the law so as not to set up their ignorance as any excuse. Hence a foreigner on landing in England is no more excused from committing a crime than if he were a native-born subject.[1] It is true that ignorance of a specific fact is on a different footing, and may make a great difference in liability, both for crimes and civil acts. If, for example, a man intending to kill a thief or housebreaker in self-defence, by mistake kills one of his own family, this takes such a case out of the category of crime, and reduces it to a mere accident or act of God.[2]

Murder by drunkards.—Though the rule is, that in order to establish the crime of murder it must be presumed or shown that the murderer is a person in possession of reason; this rule may be supposed to suffer some variation where, at the moment of committing the fatal act, the murderer is in a state of intoxication. Though drunkenness is a voluntary act, and every man must be taken to intend the natural consequences of his act, it must be observed that murder is not such a natural consequence, nor can it be said that a man who is drunk can entertain that kind of malice which is the chief ingredient of the crime of murder, and proceeds from a mind possessed of firmness of purpose. A drunken person is scarcely in a state to entertain an intent at all, either malicious or not. Though, therefore, drunkenness will not be any excuse for crime, yet if in the condition of the prisoner malice

1 R. *v* Esop, 7 C & P. 456.

2 1 Hale, P. C. 42. The subject of ignorance, as a branch of mental capacity, is treated under the head of Variations in the Law of the Person, produced by Mental Capacity.—See *post*, Ch. xi.

cannot be presumed, he can only be found guilty of manslaughter.[1]

The murderer must be a free agent.—Again, it is an essential ingredient of the crime of murder, that the murderer should be a free agent in what he does, that is to say, he must be so far master of his own actions as not to be subject to the compulsion of another. Thus, to seize the arm of another which holds a weapon, and with it to kill a third person, or instigate a lunatic to kill a third person, is murder, not in the agent or medium, but in him who uses that agent as he would use an ordinary weapon.[2] But if the compulsion operating on the agent is merely mental, and amounts, for example, to a threat to kill B if B do not kill C, this would be no defence to B if he killed C, for if the life of one or other is to be sacrificed there is no reason why B should make an innocent person suffer for the iniquitous pressure put on himself. And he can usually protect himself by the courts of law in such circumstances.[3] Some legal casuistry has, however, been exercised on the niceties of this case. Lord Hale has said that the person assailed with the threat ought rather to die himself than kill an innocent person.[4] While others hold that by analogy to the case of treason being committed under compulsion or fear of present death, in which case the treason is extenuated, so it ought to be in a case where death of a third party is caused[5] under the fear that otherwise the perpetrator will himself be murdered. The defence that one person killed another to save his own life must always be scrutinised with rigour in favour of the innocent third party; and should such a defence ever be made, it is difficult to see how the law could treat such homicide as less than manslaughter. And yet the next case to be mentioned makes even this doubtful.

Two shipwrecked persons on a plank.—This is the case which was referred to by Lord Bacon, where an innocent person's death may be caused without crime, and as it were involuntarily, or by compulsion; as where two shipwrecked persons get upon the same plank, and one thrusts the other

[1] R. v Thomas, 7 C. & P. 817; R. v Cruse, 8 C. & P. 546; R. v Monkhouse, 4 Cox, C. C. 55. [2] 1 Hale, P. C. 433; 1 East. P. C. c. 5, § 14. [3] 1 Hale, P. C. 51; Dalt. c. 145. [4] 1 Hale, 51. [5] 1 East, P. C. c. 2, § 15; Ibid. c. 5, § 61.

off under the urgent apprehension that both cannot be saved. In such a case the law seems to support the unscrupulous instinct of self-preservation, and holds this justifiable.[1] It is true the legislature has expressly made it felony to unlawfully and maliciously prevent or impede another from saving his life from shipwreck.[2] But this case of one drowning man killing another in the circumstances above named, cannot be brought within the category of unlawful and malicious acts. So that the point seems still to rest on the doctrine of the common law, and the common law may be taken quite consistently to treat the act of killing a rival in these circumstances as blameless. Such a case, indeed, like the one preceding, comes more properly under the head of self-defence, and though probably a human tribunal will seldom require to decide as to the part each takes in such emergency, it is agreeable to the spirit of the law, to hold him who drowns the other in order to save his own life blameless; for the law cannot appreciate or understand any of the higher motives of conduct, and the inherent selfishness of human nature leads each to prefer his own life to that of everyone else. It is on this ground (and many other kindred views will be found to prevail in the law), that such a compulsory homicide as killing his drowning companion, however revolting his conduct seems to all notions of the higher humanity, will be deemed blameless by the law.

Malice as an ingredient of murder.—The most conspicuous ingredient in the crime of murder is the malice of the murderer—a mental state which is variously described or explained, but means the feeling of anger, revenge, or fury towards the person murdered, and which is the motive, impulse, and immediate cause of the act.

Much speculation has been spent on the origin of this word malice, or *malitia.* Cicero treats it as necessarily importing fraud or deceit in the means used to compass the end;[3] and this may be admitted as nearly always true. But it is so common to find the meaning of a word change more or less insensibly in every language, that we need not attribute much importance to its earliest use. It is

[1] Bac. Max. 5; 4 Bl. Com. 186; 1 Hawk. c. 28, § 26. [2] 24 & 25 Vic. c. 100, § 17. [3] Cic. De Nat. Deor. lib. iii. § 30; De Offic. lib. iii. § 10.

enough that it has become a term of art applicable pre-eminently to that state of mind which precedes, and is an essential ingredient of the crime of murder. This mental state of the murderer has been variously described as a settled anger—a desire of revenge—a heart full of gall—a rancour of mind—a mind cankered by deliberate wickedness—a heart regardless of social duty, and fatally bent upon mischief—a deliberate design to take life without any excuse whatever.[1]

Malice is the element distinguishing murder from manslaughter and accident.—And it is at this point that it is most convenient to contrast murder with manslaughter, for where no malice exists or can be proved to have existed in the mind of the murderer or the slayer, yet the person who kills another may be guilty of the crime of manslaughter, which, though not malicious, yet implies an unlawful reckless and grossly negligent disposition of mind towards his fellow man, while doing the act which was the immediate cause of death to another. Accordingly, following the definition of murder, manslaughter is "the unjustifiable killing by one human being of another human being by some external or other means satisfactorily traced; and an unjustifiable killing is where neither self-defence nor any lawful business or conduct of the killer excuses it." When the death of another has neither been caused by the malicious act of any person, which is murder; nor by the unlawful reckless and grossly negligent disposition of any person, which is manslaughter; nor by that species of negligence described in a former chapter, which gives rise to an action for damages in some situations; then the conclusion is, that the death must have been merely an accident or misadventure—as one of the chances of life for which nobody is to blame. All other causes of death except accident must thus in the eye of the law come under the category of murder or manslaughter or actionable negligence. It is true that besides mere accident and

[1] Some judges, as LITTLEDALE, J., have thought it a sufficient definition to say, that malice denotes a wrongful act done intentionally without just cause or excuse.—Macpherson v Daniels, 10 B. & C. 1272. While BEST, J., said it was enough to describe malice as any wicked or mischievous intention of the mind.—R. v Harvey, 2 B. & C. 268. The former of these seems to be as accurate as a negative account of positive acts can be made.

misadventure there is the case of a capital execution, but that of necessity is an act for which no legal remedy whatever exists, simply because it is itself the carrying out of a legal remedy requiring the death of the person punished.

Staundforde and Coke seemed to treat manslaughter as synonymous with chance medley, the distinguishing characteristic of murder, namely, the malice as an ingredient being left out in manslaughter; and hence the latter term covered a variety of situations in which death was caused, some of these being little short of accident or chance, and others more or less involving an ingredient of carelessness or blame. At that time the leading idea on which manslaughter was founded was, that it was a quarrel or sudden heat ending in death, and rather accidental than intended. On this subject, and as to the general bearing of the law relating to the killing of a human being, it was well said in argument: "He who takes away the life of another is presumed to have taken it away deliberately and maliciously, till it shall appear to have been the effect of necessity, of accident, or of sudden passion; for as necessity will justify and accident excuse the fact, an ungovernable transport of passion will so far alleviate the crime as to make that which would otherwise have been murder and a capital offence manslaughter only, which saves the life of the offender. This is a condescension the law shows to the frailties of the human mind, which upon great and sudden provocations cannot command itself nor maintain its reason; but whilst the law shows this condescension, it guards the life of the subject with all possible caution and reserve against the excess and abuse of the benignity. It shelters no man whose mind is not free, perfectly free from the guilt of malice, expressed in words or implied in action. To be free from malice, he must have acted from the impulse of a present passion without deliberation or meditated mischief. If it should so have happened that the provocation did not irritate, or, irritating, did not overcome the reason, or, overcoming the reason, the mind cooled and deliberated, or had time to cool and deliberate, and then he fought and killed, he has incurred the guilt of malicious murder; for he did not act from the impulse of a present passion, and whatever motive actuated him, whether some secret grudge, or an imaginary necessity of

vindicating his honour, or of satisfying the world of his courage, or any other latent cause, he is no object of this benignity of the law. The law-books do not make it murder only where the passion has actually cooled, but where in the time that has passed it ought in reason to have cooled. And in Major Oneby's case no more than an hour had passed, and the judges thought that sufficient for the purpose."[1]

Very slight evidence of negligence indeed will thus be taken to justify a conviction for manslaughter. Thus, where a man turned out a vicious horse on a common through which there was a highway, and a child carelessly strayed a little from the road and was kicked and killed by the horse, this was held to justify a verdict of manslaughter.[2]

Express and implied malice.—Malice has sometimes been distinguished into express and implied malice, but this is nothing but a loose way of indicating the kind of evidence, out of which juries and courts infer the existence of the ingredient which is sought for. When that thing is found, whether in plain words, or by implication from acts or words not plain, it is altogether immaterial by what process it is discovered. All that requires to be said is, that it is rather more difficult to make up one's mind in one case than another. The words "express malice" would of themselves naturally indicate, that the murderer had published or expressed in plain words that he intended to murder the object of his fury; but this is seldom the case, as all the selfish instincts of human nature generally combine to save him from so openly publishing his shame. What has been generally meant by the use of the words "express malice," is merely, that that inference is drawn from such conduct of the murderer as necessarily, or rather *primâ facie*, imports deliberation, as by lying in wait, by laying plans, or laying poison, and by expression of grudges or ill-will; whereas by implied malice has been meant the same conclusion, drawn from conduct and acts which do not of themselves so necessarily and clearly import deliberation beyond that of the moment.[3]

Malice prepense.—Again, the word "malice" has often

[1] Per De Grey, S. G., R. *v* Byron, 19 St. Tr. 1223. [2] R. *v* Dant, 1 L. & C. 567. [3] 1 Hale, P. C. 451; 4 Bl. Com. 199.

been associated with the word "prepense," but this latter word means little more than is necessarily implied in the other. The meaning of the word "malice" was only made a little more difficult, when a statute of Henry VIII. first took away the benefit of clergy from the offence of "murder with malice prepense," for the use of this phrase set courts upon thinking to find out fine distinctions as to what was prepense or not prepense. Prepense, in any view, can mean no more than that kind of deliberate anger or wickedness of mind which precedes the fatal act; and, indeed, if there was no previous consciousness, it would be difficult to infer that discriminating ingredient of malice which is necessary to enter into the legal conception of murder.

Secrecy not necessary to malice in murder.—Secrecy or fraud, though often accompanying, is not a necessary part of the notion of malice. It is true, that in Bracton, Britton, and Fleta the wickedness of the act of murder is said to be aggravated by the circumstances of secrecy or treachery; but it has long been settled to be a voluntary killing of a person of malice prepense, and that whether it is done secretly or publicly.[1] Glanville also, in the time of Henry II., treated murder as a secret killing, and all other killings as homicide generally, but nothing now turns on the secrecy of the act or the designs and marks of deliberation that often precede murder. If the murderer were to proclaim aloud what he was about to do in presence of a multitude of people, it would be murder still.

Malice does not imply gain or profit to murderer.—Though in some cases murder may be committed from motives of lucre, it is obvious that it is perhaps more frequently committed without a thought as to whether profit or loss pecuniary will result. Cassius Longinus, who acquired the reputation of the most severe of judges, used to say, when investigating who was the criminal—*cui bono*, that is to say, "tell me who is most benefited by the crime, and I get very near the criminal." But this was only the method of setting about the inquiry as to the discovery of the murderer, which is altogether a different question from that which regards the characteristics of the criminal act.

[1] 17 St. Tr. 43; Staundf. P. C. 18 B.; 3 Inst. 54.

Personal animosity not necessarily implied in murder.—Though the malice of the murderer often points to one object, and is a personal and individual feeling exclusively, yet it is not necessary to show, that he had a personal grudge or revenge against the individual whom he killed. It is, on the other hand, equally little to the purpose to attempt to show that the murderer was an enemy of all mankind, as some expressions seem to imply.[1] Even if it were possible to prove so wide a proposition, as that a man is an enemy of the human race, this could only be proved by a series of circumstances pointing to individuals. The kind of malice which is an ingredient in the crime of murder is not, as Macdonald, C. B., observed, what in vulgar language is called spite; it is a wicked, depraved, and malignant spirit; a killing from a wicked and corrupt motive: it indicates a heart regardless of the life of man and bent upon mischief.[2] Though malice, therefore, is generally harboured only against one individual, and is with difficulty imputed as being entertained against several or against the public, yet there are some states of blind and uncontrollable passion, when a murderous disposition is displayed against all comers, and indicates a design to inflict death on the first person one meets, without the least regard to who is the victim. This last disposition satisfies at once the description of legal malice against whatever individual happens to be killed.[3]

And, on the other hand, if the feeling is sufficiently shown against one individual, but the murderer, while aiming at, misses his victim, and kills an innocent stranger, the crime will not the less be murder or manslaughter, according to the intention towards the principal object.[4] This, at first sight, may seem contrary to justice, inasmuch as a murderer may have had no motive or desire whatever to hurt the person killed, and hence ought to be treated as if this were a mere accident on his part. But, it will be found, that there is no reason why the man who killed and had a murderous intention, though not against his victim, should have any benefit from such an accident.

[1] 1 Hawk. P. C. 29, § 12; 4 Bl. Com. 200; 1 East, P. C. 5, § 18.
[2] R. v Wall, 28 St. Tr. 144.
[3] R. v Mawgridge, Kel. 128.
[4] Foster, C. C. 262; R. v Conner, 7 C. & P. 438; Brown's Case, 1 Leach, 148.

Case of aiming at one and killing another.—This doctrine, that it is equally murder if a stranger or third party is killed, instead of the victim aimed at, is said to be justified on this ground, that the law transfers the malice from the one object to the other, by a doctrine which has been called by Hale and Foster, a transfer of malice.[1] Others have described it as a transmutation or a transmigration of motive. And sometimes the rule has been generalized into this, that as it was in course of an illegal act being done that the killing took place, it ought to be treated as if the real intention of the killer had been actually carried out. And Coke and Foster so explain it.[2] Where a man gave poison in a roasted apple to his wife, intending to kill her, and she gave it to her child, who took it and died in consequence, though the husband being present tried to dissuade his wife from giving the apple to the child, this was held to be murder of the child by the father.[3] Coke calls it coupling the event with the intention, and the end with the cause.[4] The doctrine is, however, not quite clearly defined in its exact limits and dimensions. Hale says that if a trespasser hunt in a park, and his arrow glance from a tree and kill a bystander to whom he intended no hurt, this is manslaughter, because the trespass was unlawful. And yet if an unlicensed person shoot at a crow with a gun, and it by mischance kills a bystander by the breaking of the gun, it is but chance-medley, and no offence at all; for the want of qualification was but *malum prohibitum*, and will not enhance the effect beyond its nature. Hale thus treats the distinction as turning on whether the act that was in progress was *malum in se* or *malum prohibitum*, but this is a loose distinction at best, and, as previously shown, is incapable of being clearly defined.[5] It has also been held that if a large stone be thrown at one with a deliberate intent to hurt, though not to kill him, and by accident it kill him or any other, this is murder. Again, in another case, it was said, if A had shot at a tame fowl, wherein another had a property, but not with intent to steal it, and by such shooting had accidentally killed a man,

[1] 18 St. Tr. 1073. [2] Gore's Case, 9 Rep. 81. [3] Saunders' Case, Plowd. 474.; R. *v* Gore, 9 Rep. 81a. [4] R. *v* Gore, 9 Rep. 81a. [5] See *ante*, p. 105.

he would then have been guilty of manslaughter, because it was done in the prosecution of an unlawful action, namely, committing a trespass on another's property. But if A had had an intention of stealing the fowl, then such accidental killing would have been murder, because done in prosecution of a felonious act, namely, the intent to steal.[1] The rule, that, if A, intending by aiming at B to murder B, miss B and kill C, then A is guilty of the murder of C, may be justified in this way. A had the guilty mind, and took means adequate to give effect to it. The effect upon C is the same as if A had intended to murder C. The only difference is an accident occurring between the two acts—an accident caused by A going out of the range of lawful business or conduct, and into a course not expected or anticipated by C. There is thus no reason why A should profit by this accident, and his guilt be the less punishable. In such cases, indeed, if all that intervenes between the two facts, A's guilty attempt and the fatal stroke, is an accident, it is better that C should be protected than that A should go without punishment, seeing that in any view A was to blame and C was not. If, however, A's intent was not to murder B, but only to hurt him, and yet while missing B he kills C, it will depend on the extent to which A intended to hurt, and the means he used to carry out his intent, whether it will be murder or manslaughter of C. Hence it may be said to be a rule that the unintentional killing of one when aiming at another, is murder or manslaughter, according to whether the primary intention was to murder, or only to do at most a trifling hurt, such as would be compensated by an action at law.[2]

Provocation as ingredient in murder.—While murder

[1] Per King, C. J., R. *v* Woodburn, 16 St. Tr. 80. HOBBES ridicules the absurdity of such rule by putting this case as a *reductio ad absurdum*, that if a boy, robbing an orchard, by chance fall from an apple-tree and break the neck of a man standing underneath, Coke would treat this as a murder—as if the boy had fallen of malice prepense.

[2] See R. *v* Horsey. 3 F. & F. 287. Somewhat akin to the foregoing cases, where one crime or illegal act is intended and another is the immediate consequence, is a case which has occurred of killing a female infant by ravishing her. There seems no reason why this should not be deemed murder, for the greater crime need not merge in the lesser.—1 East, P. C. c. 5, § 13, 226; R. *v* Greenwood, 7 Cox, C. C. 404.

is usually the result of deliberation, which again may be the fruit of time, yet this feature of deliberation does not necessarily require any particular interval of time to mature it, for in the heat of the moment, and in the course of some sudden quarrel or provocation, there may be a sufficient deliberation to supply evidence of malice.[1] Nevertheless, as the state of mind at the time, if due to sudden indignation or short frenzy, is viewed with less displeasure than a settled malignity of purpose, the practice of mankind and the voice of the law agree in acknowledging this infirmity of human nature, and singling out certain grounds of provocation as reducing a crime to manslaughter, which otherwise would be deemed murder.[2] The law, it is said, has ever been indulgent to the passions of men. And while the law permits the excess of anger and passion to extenuate murder, yet it must be such a passion as for the time deprives him of his reasoning faculty, and such, that reason has not resumed its place.[3] Hale said that no amount of provocation by mere words would justify killing, or reduce the crime of murder to manslaughter, and that all the judges except one, in Lord Morley's case, so agreed; but he says it was also held that a menace of bodily harm would be such a provocation as to make the offence but manslaughter, a qualification not contained in the report of that case.[4]

It is obvious, that if a person has been previously assaulted or ill-used to such a degree, that a man of ordinary firmness and discretion would strike his assailant instead of giving vent to his feelings in words, or waiting for slow redress in a court of law, and if this is done in a sudden transport of passion, the motive of the act is of a kind very different from that settled malice which is the indispensable ingredient of murder. The law accepts anger as a lawful state of mind. And yet the circumstances require to be closely scrutinised so as to distinguish unjust from just resentment—a frivolous and petty outburst of passion from grave and well-grounded retaliation—a moderate use of force or of some harmless instrument at hand, from reckless and wanton use of a deadly weapon

[1] Per Holt, C. J., Kel. 127. [2] Fost. C. L. 315; 1 East, P. C. c. 5, § 19. [3] 17 St. Tr. 39, 51. [4] 1 Hale, 455; Kel. 55; 7 St. Tr. 421.

—the resort to violence or severity altogether disproportioned to the ground of offence from a moderate chastisement—the heat of the moment from settled revenge after the blood has cooled.

Some reasons are too trifling to justify any man in using force, or giving a deadly blow, it being deemed by the law that all persons must learn to bridle their passions to a reasonable extent, and bear even insults with some equanimity, and without resorting to violent retaliation. Thus, an unlawful killing would be deemed murder, and not manslaughter, if the only provocation set up was mere use of insulting words or gestures;[1] merely taking the wall of one; or merely using threats of violence, unless these are likely to be immediately carried into execution; or merely seeing one trespass on lands, though often warned not to do so; or merely seeing one stealing wood.[2] And even a slight blow will be no sufficient provocation to reduce the crime to manslaughter, though insulting words may be proved to have enhanced the passion.[3]

In estimating the degree of provocation, it is always important to consider whether the means used to give effect to natural resentment be not greater than what was necessary. Retaliation is natural and unavoidable in many situations; but there must be a reasonable adaptation between the means and the end, or rather the punishment must not be too severe for the affront. Blow may answer blow, but the one should only exceed the other by slight gradations, sufficient to show that insult, if insult is meant, can be repelled. If, for example, a box on the ear is immediately avenged by a stab with a knife or deadly weapon, or by a blow of great violence, this mode of retaliation shows so culpable a disregard of what is due to the occasion, that if death ensues, even though malice may not be justly inferred, so as to establish the crime of murder, still the lesser guilt of manslaughter is clearly incurred. People who cannot control their temper, and who take the law into their own hands, must at least take care not to punish an adversary with greater severity

[1] Fost. C. L. 290; 1 Hale, P. C. 455; 1 Hawk. P. C. c. 31, § 33; 1 East, c. 5, § 20. [2] Holloway's Case, Cro. Car. 131; Palm. 545. [3] R. v Lynch, 5 C. & P. 324; R. v Sherwood, 1 C. & K. 556; Stedman's Case, Fost. 292.

than the law itself would do, and if they do not take this care, the risk will fall on their own head. Persons may quarrel and be reconciled, or an old grudge may be revived and burn with increased fury. But wherever there is mixed up with the circumstances of the death some provocation, care must be taken to see whether the provocation was real or pretended, whether the blood had time to cool, however great might be such provocation, for the character of the crime will depend on the reasonableness of the inference that malice did or did not govern the fatal act.[1]

It is difficult to extract rules as to this matter without knowing the surrounding circumstances, but manslaughter only has been deemed to be committed where the death was caused by the immediate revenge of a gross personal indignity;[2] or revenge of a blow on the face drawing blood,[3] or revenge of an arrest without proper authority.[4] And the moderation and unexpected result of the act will also negative malice and reduce the crime to manslaughter, as when the instrument used was not calculated to endanger life;[5] or where it was only a tin can or stick that was used to strike.[6] In these cases the jury must say whether the intention was to kill or merely to do some slight hurt.

Mutual fighting and a fatal issue.—Again, in mutual fighting, a balancing of circumstances sometimes gives murder and sometimes manslaughter as the true character of the act. Where a fight or duel is engaged in with deliberation and concert, or even without such deliberation, if express malice be developed in course of the fight, and a fatal issue ensue, this will be murder. But if in the heat of passion a fair fight continues, and nothing shows disproportionate violence or anger, this will be nothing but manslaughter.[7] In such circumstances the materiality of the inquiry, Who gave the first blow? ceases altogether after a series of blows have been interchanged. But where a sword or knife was drawn, after a

[1] 1 Hawk. P. C. c. 31, § 30; 1 Hale, P. C. 452; Plowd. 100.
[2] Kel. 135; 4 Bl. Com. 191.
[3] Stedman's Case, Fost. 292.
[4] Buckner's Case, Sty. 467.
[5] Turner's Case, Comb. 407; 1 L. Raym. 143; 2 L. Raym. 1498.
[6] R. v Howlett, 7 C. & P. 274.
[7] R. v Walters, 12 St. Tr. 113; R. v L. Byron, 11 St. Tr. 1177; R. v Ayes, R. & R. 166.

long heat of varying success, then it is murder;[1] and the same whether the struggle began in play, if it is carried on in anger.[2] And where a stranger interferes in a fight and takes a side, it depends entirely on what was his motive, and the nature of the exigency, for according to that he may or may not be in a better position than the combatants if he identify himself with one.[3]

Fatal accident in contests of skill and prize-fights.—The case where contests of skill and strength occur also stands on a delicate footing. There are some of these which the law looks upon as innocent if fairly conducted, and with a single eye to the professed object, namely, to develop strength, foresight, or endurance. Such may well be considered to be the case with wrestling, fencing with foils, foot-races, which, though attended with occasional danger, yet have for their object nothing calculated to hurt or maim an adversary for the mere sake of injury. Hence, if any fatal issue arise, it will usually be treated as accident or misadventure.[4] On the other hand, prize-fights, duels with swords or pistols, cudgel-playing, though some of them are incidentally attended with only harmless results, are primarily intended to excite the passions of the parties and spectators to such a degree that each endeavours to achieve a victory over the other at any cost, and though begun with a show of fair play, often become heated with passion, and develop such malignity of hatred and recklessness of life, that all the elements of criminal disposition and of malice are present. Hence, if any fatal result occur, the guilt of murder more frequently than manslaughter will fall on the adversary who kills. Some of these contests will be viewed with different eyes by judges, according to their idiosyncrasy, whenever the sport is near the dividing line of the lawful and the unlawful. Hale seemed to think a fatal accident

[1] R. v Snow, 1 Leach. 151. [2] R. v Carmiff, 9 C. & P. 359.

[3] 1 Hale, 484; 1 East, P. C. c. 5, § 58; R. v Bourne, 5 C. & P. 120.

[4] Fost. 260; 1 East, P. C. c. 5, § 41. And the same conclusion was come to by the ancients, for in the public games in Greece and Rome, should a fatal accident occur it was deemed misadventure and nothing more.—*Plato*, *Leg.* b. vii.; *Dig.* ix. 2, 7; 2 *Whewell*, *El. Mor.* § 116. And in our own law it was once said that if by the king's command the sword-playing took place, any fatal issue would be deemed only accident.—1 *Hale*, 473; 4 *Bl. Com.* 167.

in course of wrestling, cudgelling, foils, and like diversions ought only to be treated as manslaughter; while Foster, treating these as manly diversions, seemed to treat them as mere accidents and nothing more, or nothing but legal negligence. Each judge relied on Sir J. Chichester's case for the inference he drew as to the rule of law.[1] Much must necessarily depend on the weapons used, if any, and how they are used. Yet Sir M. Foster says that in cock-throwing, where a man in throwing missed his aim and killed a child looking on, he had ruled it to be manslaughter, for it was a barbarous, unmanly custom, frequently productive of great disorders, and dangerous to bystanders, and one that ought to be discouraged. The views of the law in such cases will vary from age to age, and what would be deemed in accordance with the rougher manners of former times may be intolerable in ours.

How far for the jury to decide on malice.—Since the critical point in question of unlawful killing is thus the malice of the killer, the presence of which as an ingredient makes the offence murder, and its absence makes it manslaughter, it is important to know, whether and how far it is for the jury or for the judge to decide that point. It was laid down by Sir M. Foster, that whether the *malus animus* or malice existed was a matter of inference to be determined by the judge, though whether the facts existed out of which the inference is derived is matter for the jury to decide.[2] And the court, and not the jury, is the judge whether the blood has cooled, and the violent transport of passion has abated.[3] Yet in all mixed questions of law and fact it is well to leave them to the decision of juries.[4] And malice, and especially what is termed malice in law, is peculiarly within the province of juries. The degree of probability that death will ensue from a particular act, and the intention of the agent, are inferences to be drawn from each peculiar combination of facts, and must vary from case to case. And so, whether in a doubtful case the murderous act was done from malice or from some provocation co-existing.[5] Moreover such inferences are to be deduced

[1] Keil. 108; Fost. 260; 1 Hale, 473. [2] Oneby's Case, 2 L. Raym. 1485; 17 St. Tr. 50. [3] Ibid.; R. v Fisher, 8 C. & P. 185. [4] Macdonald v Rooke, 6 Bing. N. C. 217. [5] R v Hayward, 6 C. & P. 157.

from ordinary transactions and from the conduct and language of persons of various classes. All these are peculiarly matters for the consideration of a jury and not of the judge. In a case of shooting a man who was out at night dressed in white as a ghost, and who terrified the neighbourhood, three judges held that this was murder; because, though the ghost committed a misdemeanour, it was no reason why he should be shot; and they told the jury, if they believed the evidence, they must either find the defendant guilty of murder, or acquit him. But the jury insisted on finding a verdict of manslaughter. In that case the court refused to receive the verdict.[1]

Murder by one of several acting illegally together.—The unlawful acts, in prosecuting which murder is committed, often consist of some conspiracy in which several persons combine. The rule is, that, where several persons combine to commit some breach of the peace in a tumultuous way, or some felonious act, and in carrying out the common design one kills a third person, all are equally guilty of murder, though some may have no active part in the particular act.[2] Thus where two persons, after being refused a supply of beer at a prohibited hour, broke into the public-house, demanding to be supplied, and fought with the publican, one of them stabbing him with a sharp instrument, it was held that both were guilty of murder.[3] And where Lord Dacre agreed with several persons to hunt in another's park for deer, and to kill all who might resist, one of the party having killed the keeper, all were held guilty of the murder, though Lord Dacre at the moment was a quarter of a mile distant, and knew nothing of the individual blow.[4] So where several were engaged in stealing;[5] in beating another;[6] and in smuggling.[7]

The reason why all are deemed guilty in such cases is, that the presence of accomplices gives encouragement, support, and protection to the person actually committing it.[8] And indeed in Anglo-Saxon times the barbarous

[1] 1 Russ. Cr. 546. [2] 1 Hale, 439; 1 Hawk. P. C. c. 31, § 51; 4 Bl. Com. 200. [3] R. v Willoughby, East, P. C. 288. [4] Dacre's Case, Mo. 86; Palm. 35. [5] Fost. 258; R. v Collison, 4 C. & P. 565; R. v Howell, 9 C. & P. 450. [6] Errington's Case, 2 Lew. 217. [7] Plummer's Case, Kel. 109. [8] 18 St. Tr. 1106

notion was acted on, that any one present at a death was a *particeps criminis*.[1]

Not only must the act be done in pursuance of the common design, but it must be done while the parties are all acting at the time in carrying it out, for if there has been an interval and new confederations, the bond between the parties is thereby relaxed.[2] One distinction is whether the murder naturally flowed out of the prosecution of the common purpose, as it did, where several persons went to seize goods illegally by force, and one of them threw a stone at a woman and killed her;[3] and where several went to poach together and one killed the keeper;[4] and where several persons were pursued on a hue and cry, and one turned and slew his pursuer;[5] and where several conspired to rob a man, and one of them killed the victim.[6]

In estimating the joint guilt of several persons thus engaged in a common illegal design, care must always be taken to distinguish whether the murderous act was committed in furtherance of such design, for otherwise the guilt of the murder will fall on the individual whose hand effected it; and those associated with him, though in some cases chargeable with manslaughter, will not be guilty of murder.[7] Thus where two were beating one, and a stranger interfered, whereupon one of the assailants stabbed the stranger, this was held to be murder only in the one who stabbed, because the stabbing of a stranger was a collateral matter not arising in furtherance of the assault.[8] And in reference to such interferences, the stranger must take care to use no more violence than is necessary to prevent the continuance of the fight.[9]

Parties implicated in murder.—As regards the parties to a murder there are, in this as well as other felonies,

[1] Leg. Inae, c. 33; Leg. Alf., § 26. [2] Case of Drayton Bassett, 1 Hale, P. C. 440; East, P. C. 300. [3] R. v Mansell, Dyer, 128; R. v Hodgson, 1 Leach, 6.
[4] R. v Edmeads, 3 C. & P. 390; R. v Whithorne, 3 C. & P. 394; R. v Warner, Ry. & M. 380, 5 C. & P. 525; R. v Hawkins, 3 C. & P. 392. [5] R. v Jackson, 7 Cox, C. C. 357; R. v Howell, 9 C. & P. 437. [6] R. v Price, 8 Cox, C. C. 96. [7] R. v Franz, 2 F. & F. 580; R. v Plummer, 12 Mod. 627, Kel. 109; R. v Salusbury, Plowd. 100; R. v Borthwick, 1 Dougl. 207. [8] 1 Hawk. P. C. c. 31, § 52. [9] R. v Bourne, 5 C. & P. 120.

degrees of guilt according to the part taken by the several actors. The person who, by his own hand or immediate act, kills or poisons another is the principal. Others may be accessories or aiders and abettors. The mere presence of a person at the commisson of the crime of murder is not the test of being an aider in the crime. For a person may look on and yet not be guilty, either as a principal or as an accessory; though the least that one ought to do, if present under such circumstances, is to interfere and prevent whatever it is reasonably safe to do, consistently with one's own self-preservation.[1] And, for a like reason, he who holds the stakes, while two persons fight but not in his presence, cannot on that account alone be construed to be an accessory before the fact.[2]

In the case of Lord Mohun, the question was discussed how far a friend, who accompanies A to meet B, and who knows A is at enmity with B, will be implicated in any guilt arising out of A attacking and killing B. The judges held that the mere knowledge by the friend of A's animosity and the mere accompanying of A to meet B was no crime; but if the friend knew that A intended to kill B, and A did kill B, then it is murder in the friend also. And hence in such a situation everything will turn on whether the friend impliedly by his conduct knew and approved of A's design.[3]

While the mere presence of a person does not constitute one as principal, on the other hand, mere absence is not a test of his not being an accessory.[4] If one watch at a distance and the other kill, both are alike guilty of murder.[5] It is also possible for the one who causes the death to be guilty of manslaughter only, and the abettor to be guilty of murder, according to the malice or intent proved in each individual.[6]

Where there is a principal actor in the murder, and others more or less engaged with him, it is competent to try each separately for his several offence. If a person instigates or counsels a third party himself, or by any intermediate agent, to commit a murder which is afterwards carried

[1] Fost. C. L. 350; 1 Hale, P. C. 439. [2] R. v Taylor, 44 L. J., M. C. 65. [3] R. v Mohun, 12 St. Tr. 1034, 1038. [4] Fost. C. L. 350; 1 Hale, P. C, 439. [5] 1 Hale, P. C. 615; Fost. C. L. 350. [6] 1 Hale, 446; R. v Salusbury, Plowd. 97.

out, the former is guilty of being an accessory before the fact to the murder, and his offence is punishable in the same manner as murder itself.[1] For though the party counselled ought to know he is not bound to act on such advice, and cannot excuse himself on that account, the adviser is responsible for all that ensues on his advice, if acted on, and even for things done in course of such advice being pursued.[2] The responsibility of the adviser is, however, limited to the main or substantial point, and only to such things as are the direct and immediate consequence of the advice being acted on, and does not include remote and collateral effects. Thus, where A counsels B to poison C, and C gives part of the poison to D; or if A counsels B to beat C, and B stabs or poisons C, then A will be responsible only for the murder or beating of C, and no further.[3] Whereas if A counsel B to poison C, and B stabs or shoots C, A is equally guilty, for it was the death of C that he substantially instigated. Thus in ascertaining whether the murder was in pursuance of the counsel or instigation, the test is whether the perpetration of the crime as committed was a probable consequence of such counsel. And when the crime committed is the same in substance, though the means used may differ, the person who counsels is nevertheless guilty, as an accessory before the fact; thus it is, when the instigation is to poison, and the deed done is to stab or shoot.[4]

Moreover, to solicit and incite a person to commit murder, though none is committed, is itself a misdemeanour.[5]

Receiving a felon into one's house.—Where a person has had no part in a murder, but merely has after the fact acquired knowledge, that is, reasonably certain knowledge that the murder has been committed, he will be guilty of being an accessory after the fact to such murder, if he harbour or assist or relieve the murderer, or cause his escape.[6] An accessory after the fact is liable to imprison-

[1] 24 & 25 Vic. c. 94; 24 & 25 Vic. c. 100, § 67. [2] 2 Hawk. P. C. c. 29, § 18. [3] Ibid.; R. v Michael, 2 Mood. C. C. 120: 1 Hale, P. C. 431. [4] 2 Hawk. P. C. c. 29, § 20; 4 Bl. Com. 37. [5] R. v Gregory, L. R., 1 C. C. R. 77. [6] R. v Greenacre, 8 C. & P. 35; 2 Hawk. P. C. c. 29, § 35.

ment for two years or less, or to penal servitude for life, or for at least five years.[1]

Owing to the absence of malice, which implies deliberation, one distinguishing characteristic of manslaughter is, that there can be no accessories before the fact, for as the principal actor is assumed to have himself not intended the death, or at least not premeditated it, he can have no associates. Therefore, though there may be more than one guilty of the principal felony, all such must have been present and taking part together in the criminal act.[2] Yet if poison was given to procure abortion, accessories might be distinguished.[3] And though there may not be accessories before the fact to manslaughter, there may be accessories after the fact.[4] The offence of an accessory after the fact is, however, one seldom prosecuted, partly from the difficulty of evidence, and partly because sympathy and humanity incline most people to treat this as a venial offence. And the court will not allow even a confession of the guilty principal to be treated as evidence against the accessory, who must always be more or less uncertain whether or not the person he harboured has committed the crime. Moreover something more than the bare receiving a felon into one's house is required in order to prove the offence of an accessory after the fact. And the receiving by a wife of her husband, though she has good reason to believe he has committed a felony, is deemed no offence in her, owing to the superior claims of her relationship.[5]

Murder excludes the notion of lawful business or conduct.—Though murder is a malicious killing of another, yet, owing to the difficulty in ascertaining whether malice existed and the secrecy and fraud under which it is concealed, it is well to add that the killing must be such that it cannot be justified either by self-defence or the lawful conduct or business of the killer. This branch of the definition opens up several situations in which the killer is, or affects to be, lawfully doing some business of his own at the time, and if this lawful business or conduct is made plain, it generally excludes and negatives any

[1] 24 & 25 Vic. c. 100, § 67; 27 & 28 Vic. c. 47. [2] 1 Hale, P. C. 450. [3] R. v. Gaylor, D. & B. 288. [4] R. v Greenacre, 8 C. & P. 35. [5] Bract. b. iii. c. 32, § 9.

necesssity to search for a malicious motive. What then are those departments of lawful business, and conduct, which lead most frequently to a qualification of the rule that killing is murder? These embrace several common and familiar classes of circumstances. Nothing can be more lawful than self-defence, yet even that may be carried to excess; so may the defence of one's relatives and one's property. There are other lawful things in the doing of which a human being may be killed, and the motive or malice of which may be doubtful till the circumstances are scrutinised. Such are the correction of children—the enforcing or resisting of illegal arrests—the resisting and stopping of crime. On the other hand, there may be a killing of human beings in a course of cruel treatment, and apparently also by perjury in certain circumstances. Of these in their order.

Killing in self-defence.—Self-defence is one of the irrepressible tendencies of human nature, and no law of civilisation or any code of positive enactments, however perfect, can hope to dispense with it. All the actions, indictments, sureties of the peace, and remedies, that courts of law can entertain and enforce can never supersede that radical law of the human being, which operates with the rapidity of an instinct, and which teaches each one who is attacked without cause to repel force with force, to overcome that force with still greater force—to proportion the resistance to the strength of the attack, but at all extremities, even if a deadly weapon is at last the only means of victory, then to attain victory even if the life of the assailant is destroyed in the effort. The reason why self-defence must be recognised in every law is this, that as life or death is often an affair of a moment, there is none but the individual attacked who can bring to bear a sufficiently prompt and effective remedy for the occasion.

While self-defence is a lawful remedy reserved to all human beings against immediate violence, it must at the same time be used with the caution and consideration for others which become a reflective being. There are certain qualifications therefore to be used in defining the limits of this right. The first is, that the degree of force used in self-defence must not exceed what is reasonably calculated to prevent the adversary's success. The second is, that

while one may gradually advance from a lower to a higher degree of force according to the occasion, yet the highest of all, namely, the killing of the adversary, can only be justified by the immediate apprehension that nothing else will prevent the assailed being himself killed. The law always requires that every man shall respect his neighbour's life and safety if consistent with his own; but if in extremities one of two lives must be sacrificed, then self-preservation is presumed by law to be the natural choice of all, though in a few sublime instances of devotion heroes and martyrs have thought little of their own lives in comparison with those of others, or with the triumph or vindication of some great and worthy object that is to be attained. The law may be said, however, to be incapable of comprehending such self-devotion. It deals only with common humanity, endowed as it is with a sufficiency of selfish instincts. The higher elevations in moral and religious life which the law cannot attain to have other standards of right and wrong. Its views of life are mostly selfish. It does not profess to protect or encourage or even comprehend martyrdom.

Saving one's self by flight before killing pursuer.—It seems that a kind of artificial rule was attempted to be laid down on this subject by Hale, to the effect that no one would be justified in killing another in self-defence without first running or flying to the wall, or other *non ultra*, so as to avoid the violence of the assault; and when he felt bound to say how far such flight must be carried, Hale answered, "Suppose it half a mile." But this was carrying the niceties of dogmatic rules too far. Who can pretend to judge when a man's extremity is reached, when he has shot his last arrow, and must either kill or be killed? In each supreme moment the party attacked must usually be judged with candour, for a third party can seldom enter into each critical situation and the surrounding difficulties of another, which must be measured in the twinkling of an eye. No rule of half a mile or half an hour can be of the least assistance in guiding a jury to decide, whether the killing in self-defence was a moment too soon. When swords and pistols are called for, as Pratt, C. J., said, no man can be expected to stand still and be murdered.[1]

[1] 16 St. Tr. 52.

Lord Hale thinks it right also to qualify his rule with this proviso, that while it is the duty of an attacked person first to fly before killing his assailant, yet this flight must not be a feigned flight, as "when fighting-cocks retire to gain advantage." And he admits that if a man is attacked in his own house, then he is not required to fly, because the protection of his house excuses him.

One of the emergencies in which the doctrine of self-defence usually comes into play is where there is some sudden brawl, and a person is attacked with sufficient force and malice to justify or excuse him in giving a fatal blow. This is often called chance medley, which means a casual affray or chaud medley (*chaud melle*), when the affray gives rise to heat and passion. This was one of the classes of circumstances under which the killing of another was deemed excusable if, after blows on each side the slayer did all he could to decline, but was forced, in self-defence, to kill his adversary in order to save his own life.[1] But if the circumstances do not clearly show, that there was immediate danger to the life of the slayer, then he will be guilty of manslaughter.[2] For the very notion of self-defence implies that not only was there no attack in the first instance, but that the occasion was adequate to justify the degree of force that was used to repel force, and that the slaying was avoided in all reasonable ways until the very last.[3] And as in cases where manslaughter is committed in circumstances of provocation, it is not very material who first began a fight, so this is immaterial in questions of slaying in self-defence. The important consideration is, whether, when the one party slew the other, the former had done all he could in the circumstances to avoid this extremity, and was under the immediate apprehension that if he did not do so he would himself be killed.[4] Yet our ancient law seems to have agreed with the law of the most ancient of communities in being unable to draw fine distinctions, for it classed killing in self-defence with murder, and treated it at least

[1] 24 Hen. VIII. c. 5; Staund. P. C. 16; 3 Inst. 55; Kel. 67; 4 Bl. Com. 184; Fost. 275.
[2] Fost. 276; 4 Bl. Com. 184.
[3] R. v Smith, 8 C. & P. 160; R. v Ball, 9 C. & P. 22.
[4] Fost. 277; 1 Hale, 482; 1 East, c. 5, § 53.

as *primâ facie* murder, and so requiring some formal pardon.[1]

A woman defending her honour.—It is the same doctrine of self-defence, that justifies a woman in defending her honour at all hazards. A woman may kill a man to prevent being ravished, and though Hale said the reason of this was because rape was felony—a reason which would equally apply to all other felonies—a much better reason is this, that the law of civilisation estimates the possession of purity and honour as superior to the life of any man who assails it. It is a question of comparing the intrinsic worth of a valuable possession, the worth of virtue and purity with its negative—the worthlessness of licentiousness and passion. If the sacrifice of the assailant is necessary to the former, the law supplies no rule by which that sacrifice can be shown to be either criminal or blamable; and no court would criticise very nicely the reasonableness of drawing the limit of forbearance too soon.

Killing in defence of wife, child, relation.—Not only does the law excuse one who slays another in defence of his own life, but on the same principle it excuses one, who in like manner acts in defence of the life of a wife, husband, or child, master or servant, there being sufficient identity of interest and feeling to make the act of one the act of the other; and though the law takes too frequently only a selfish view of human nature, in this instance the generosity arising from close ties of affection or duty is viewed as entering legitimately into the motive of action.[2] As regards, however, the relation of master and servant, especially considering the gradual tendency of that relation to become less close, the circumstances would require more need of justification.[3]

Husband killing an adulterer.—Whether a husband is justified in killing an adulterer, and under what circumstances, has attracted the attention of all legislators from the earliest times. It seems to have been always deemed a justifiable act for a husband to kill an adulterer *flagrante*

[1] The exemption from punishment of a person who slew another in self-defence or by misfortune was shown by a pardon.—2 Ed. III., St. North. c. 2.

[2] 1 Hale, P. C. 484; 4 Bl. Com. 184. [3] See *ante*, p. 296.

delicto. The Greeks excused one who slew the debaucher of a wife, mother, or daughter.[1] Plato allowed the woman, her father, brother, or son, to kill her ravisher.[2] In Rome this was a good excuse also, and there at one time the husband might kill the adulterous wife also;[3] though at a later period she was only whipped and sent to a convent.[4] In Tonquin the husband might kill the wife as well as the adulterer, or if she was tried, she was condemned to be trodden to death by an elephant.[5] The punishments for adultery in nearly all ancient, and especially Eastern, countries, have been merciless.[6] The old Welsh law was from a like motive most indulgent to the wife of an adulterer; for she was excused for killing the husband's concubine with her hands, whenever they met.[7] This is a subject on which no definite rule can be laid down, though Hale and older writers have done so very broadly. One can easily see that while a natural and uncontrollable resentment may impel a husband in some circumstances to kill the adulterer, there may be many, and perhaps a majority, of cases, where such a justification could not be urged or defended. And nothing but the common sense and experience of juries, assisted by a judge and applied to each individual situation, can adequately solve this point and draw the line between murder and manslaughter.[8]

The provocation of a husband on a view of this offence, *flagrante delicto*, has been held to negative the malice and reduce the crime to manslaughter, but not to justify the act further.[9] And a like view was acted on where a parent slew one detected in a kindred offence with a child:[10] but mere suspicion of adultery, though well grounded, will not constitute any adequate provocation, and it will be murder, should death be so caused.[11] And, as civilisation advances, and remedies of divorce become improved,

[1] Demosth. Aristoc. [2] De Leg. b. ix. [3] Dion. b. ii. 25; Suet. Tib. [4] Nov. 134, c. 10. [5] 9 Pink. Voy. 723. [6] See *post*, Ch. viii. [7] Dimet. Code, b. ii. c. 8; Gwent. C. b. ii. c. 39; Welsh Laws, b. iv. c. 4.

[8] Fost. 296; R. v Kelly, 2 C. & K. 814. HOLT, C. J., said, indeed, that jealousy was the rage of a man, and adultery was the highest invasion of property.—17 *St. Tr.* 70.

[9] R. v Manning, T. Raym. 212; R. v Maddy, 1 Vent. 158; Jones, 150. [10] R. v Fisher, 8 C. & P. 182; R. v Royley, Cro. Jac. 296; 1 Vent. 159. [11] R. v Kelly, 2 C. & K. 814.

there is less justification than ever of this leniency in the law towards such an outbreak of ungovernable fury in the circumstances described.

Killing in defence of exclusive possession of property.— Not only may a man lawfully slay another in defence of his own life or that of a near relative, but he may often do so in the course of the defence of his own exclusive possession of property, if such an extremity is necessary for the protection of his own life also, though perhaps in a secondary sense. The foundation of this right is the rule, that he, who is entitled by law to the possession, and is actually in possession, can turn off all trespassers or strangers who come on the property without permission. If they refuse to quit on request, no matter whether the request be courteous or uncourteous, be generous or harsh, with or without just cause, the trespasser may be pushed off by main force; and any resistance becomes illegal, and the trespasser is in the wrong in delaying from the moment that the request is made known. If this were not the law, every man's house would cease to be his castle, that privacy which is the main object of property would be destroyed, and a sense of insecurity would be introduced which would sap the springs of industry and order. Yet there ought to be some limit to the mere right of defending property at all hazards.

This subject has exercised the skill and care of legislators in ancient times. The Jewish law held it lawful to slay a thief found in the night.[1] The law of the Twelve Tables allowed it also, but required the slayer to call aloud on the occasion.[2] Yet both laws seemed to agree, that the thief was only to be slain in the day-time, if he defended himself with a weapon; and the Roman law required also the slayer in that case to call aloud.[3] The laws of Solon and Plato both permitted an owner to slay a thief in the night-time, but in the day-time only if there was accompanying violence, as the law could sufficiently redress any wrong without requiring this extreme penalty to be inflicted.[4] This notion of calling aloud was intended to be a warning; and in Anglo-Saxon times, if a man deviated

1 Exod. xxii. 2.
2 Dig. ix. 2, 4; Macrob. Sat. b. i. c. 4.
3 Exod. xxii. 3; Dig. ix. 2, 3.
4 Demosth. adv. Timocrat.; Plato, Leg. b. ix; Diod. Sic.

from the highway, he was bound to sound a horn, otherwise he might be treated as a robber.[1] Yet it seems to have been considered doubtful, whether our common law held it lawful to kill a thief or murderer.[2]

The mode of dealing with trespassers on property has long been tolerably well settled. Though a trespasser will not on request leave one's house or land, and though the force used is insufficient to overcome his resistance, it does not follow, that the owner or rightful possessor can put such trespasser to death. In order to justify this, the object and manner of the trespasser's invasion must be such as to lead to the immediate apprehension, that the owner will himself be killed, or ousted of his possession, and prevented from using his property if he do not despatch the adversary. If a man's house is broken into at night, the worst intentions may fairly be imputed to the burglar or housebreaker. On the other hand, if a man trespass in daylight, without permission, or even against permission, and with or without any frivolous excuse, it would be altogether illegal in the owner to shoot or even to assault him with violence. If there is no show of violence on the part of the intruder, if there is nothing beyond a mere intention to annoy, the proper and only safe remedy is that which the law affords by an action of trespass in a court of law. Between these extremes, however, a great variety of circumstances exists, and it will be chiefly owing to the conduct of the intruder, and the intention to eject the owner, or rob or assault him, whether the extremity resorted to by the owner can be justified.[3]

The law is extremely lenient in viewing the resentment of those who seek to preserve inviolate the security of their own homes, or to keep possession of their own property, real or personal.[4] And if a trespasser break into a house, even in the day-time, with a felonious intent, it is said he may be killed without blame.[5] Yet all these extreme acts ought to be carefully examined to see how far the circumstances reasonably led up to them. A statute of Henry VIII., indeed, expressly exempted the person from

[1] Anc. Laws, K. With. [2] Barringt. Stat. 111. [3] Child's Case, 2 Lew. 214; Hinchcliffe's Case, 1 Lew. 161. [4] 3 Ed. III. Coron. 35; Crompt. 27 b.; 1 Hale, 473, 486; 1 East, P. C. c. 5, § 56. [5] 1 Hale, 488.

punishment who slew a burglar or thief entering his mansion.[1] And this was held to exempt a lodger or sojourner likewise.[2] Such excuse ought to be sustained when the commission of felony involves violence, or imminent danger to the person.[3] Whereas, if the object is merely to do something not implying violence, as to pick a pocket;[4] or to beat one merely to make him desist; or to carry off goods, or steal fowls; such killing would be manslaughter, as being in excess of the occasion.[5] Much will, therefore, depend on the reasonableness of the conduct of the person killing, and the justness and fairness of the inferences drawn by him as to the intentions of the trespasser, and of the moderation of the force used to overcome the assailant in each critical situation.[6]

Killing to prevent crime.—Not only may a person in self-defence lawfully kill an assailant, but, if he sees a felony about to be committed, he may interfere and prevent the crime; and if in repelling force with greater force, he kill the perpetrator, this has been called justifiable homicide.[7] This is said to be so, for example, where the perpetrator is engaged in a burglary or arson. But if the occasion for preventing the crime has past, then the extreme measure of slaying such party can no longer be justified; and if resistance has occurred, and the party is killed, this can seldom be less than manslaughter.[8] So in the case of mutual combats or sudden affrays, a bystander should act with caution, and should not interfere without giving notice, nor interfere by taking either side: but if after such notice he do interfere against both, and use force, and one of the persons fighting is killed by him in self-defence, this has been said to be justifiable homicide.[9]

Murder in arrests by officers of law.—Murder is frequently committed in the course of an arrest of a person, which is made by a constable or bailiff under authority of legal process. The disputes and angry feeling thereby excited often lead from small beginnings to deadly

[1] 24 Hen. VIII c. 5. [2] Cro. Car. 544. [3] R. *v* Bull, 9 C. & P. 22. [4] 1 Hale, 488. [5] Ibid.; 1 Hawk, c 28, § 23; Kel. 132; 1 East, P. C. c. 5, § 44. [6] Levet's Case, Cro. Car. 538. [7] 1 Hale, 481, 484; Fost. 274; Handcock *v* Baker, 2 B. & P. 265. [8] 1 East, c. 5, § 60; 1 Hale, 485. [9] 1 Hale, 484; 1 East, P. C. c. 5, § 58.

encounters. And these encounters generally arise out of some irregularity in the supposed authority of the person arresting. It is a rule applicable to all ministerial officers, and especially constables, that if they are at the time in the lawful exercise of their duty arresting felons or breakers of the peace, and are attacked and killed, it is murder in the person killing; for it is deemed a wanton and deliberate attempt to defy the law and make the officer the victim of that attempt. The malice of the act is therefore easily presumed from the circumstances. In such cases there may be some nicety in ascertaining, whether the constable was at the time acting in the course of his duty, and this will often be a question, preliminary to determining the denomination of the crime committed.[1] As it is absolutely necessary, that, while law exists, there shall be officers of the law to arrest its transgressors, all should acquiesce in the regular discharge of such a duty; and it is idle to say that there can be any just cause of provocation to any well-disposed citizen by an officer of the law executing on him as well as others the behests of the law, whatever they may be, and however disagreeable or unfortunate. But it is obvious the main troubles arise out of the difficulty in the party arrested being satisfied that up to the point of arrest this course of the law has been fairly and regularly followed without fear, favour, or partiality. A constable of one London parish arrested a woman in another parish at Covent Garden, which he had no authority to do. Certain bystanders, utter strangers to the woman, attempted to rescue her, and the constable's assistant was killed by them. Whether this was murder in these bystanders became a subject of anxious deliberation to twelve judges; and seven against five held that it was not murder, for there was sufficient provocation to reduce the offence to manslaughter. Lord Holt, the leader of the majority of these judges, carried away by a fine enthusiasm, thus gave out his reasons: "If one be imprisoned upon unlawful authority, it is a sufficient provocation to all people out of compassion, much more when it is done under colour of justice, and when the liberty of the subject is invaded. It is a provocation to all the subjects of

[1] R. v Hems, 7 C. & P. 312; R. v Hagan, 8 C. & P. 167; R. v Porter, 9 C. &. P. 778.

England; a man ought to be concerned for Magna Charta and the laws; and if any officer against law imprison a man, he is an offender against Magna Charta." Many years later another judge, Sir M. Foster, deeming this unsound law, with equally fine irony observed: "The prisoners saw a woman, a perfect stranger to them, led to the Round House under a charge of a criminal nature. This upon evidence at the Old Bailey a month or two afterwards cometh out to be illegal imprisonment; a violation of Magna Charta! And these ruffians are presumed to have been seized all on a sudden with a strong fit of zeal for Magna Charta, and in this frenzy to have drawn on the constable and stabbed his assistant."[1]

Where bystanders assist an officer in executing the law and keeping the peace, they are in the same position in this respect as the constable, and are deemed entitled to the same protection while rendering this assistance.[2] But bystanders, who have not seen any felony or breach of the peace committed, or any warrant authorising such officer, must take the risk on themselves of assisting, if it turn out that the arrest is unlawfully made;[3] and they should always inform the party to be arrested of the object of their interference.[4] Thus if a constable or bailiff has lawfully arrested his prisoner, he is entitled to repel force with force, and keep possession, but he is not justified in coming to extremities and killing the prisoner, even though the latter resist or run away, for he must not use means wholly disproportioned to the end in view.[5]

General requirements as to valid arrest.—The circumstances under which an arrest can be legally made belong more properly to the subject of Arrest, which is treated hereafter.[6] It is enough here to say, that while a constable or any other person requires no warrant in some circumstances to authorise him to arrest for certain crimes, in all other cases the party arresting must have the express authority of a statute, or be expressly authorised by some warrant of a court or magistrate to make such arrest. In the case of authority given by statute, the party arrested is

[1] Fost. Cr. C. 316. [2] Fost. C. L. 309; 1 Hale, P. C. 462. [3] 1 Hale, P. C. 490; Fost. 318. [4] Foster, 272; 1 Hawk. P. C. c. 31, §§ 49, 50. [5] 1 East, P. C. c. 5, § 63; 1 Hale, P. C. 481. [6] See *post*, Chap. vii.

as much bound to know of that authority as the party arresting, and the latter need not expressly refer to it. In the cases where a warrant of a court or judge is required in order to justify an arrest, the person arresting is bound not only to have obtained such warrant beforehand, but he must have such warrant in his possession at the time of the arrest. The reason is, that no one is bound to surrender his liberty at the call of another without knowing what authority that other has for such demand, and is entitled to demand a sight of the warrant in order to judge of its sufficiency and the truth of it. And where no warrant is needed, he is nevertheless equally entitled to be informed on what ground or for what offence he is arrested, subject to these essential requirements being fulfilled; beyond this the party arrested has no further right to resist, and if he do so, he and others may conclude that he is in the wrong. Lord Hale says, that, if a man for debt or trespass be about to be arrested, and fly, and the bailiff kills him, it will be murder. But Foster qualifies this by adding, that if the officer in the heat of pursuit trip up his heels, or give him a stroke with an ordinary cudgel or other weapon not likely to kill, and death ensue, then it might only be manslaughter. Great caution is obviously required in the officer, so that the party's life shall not be unnecessarily sacrificed. It may be doubtful in any case whether the killing in furtherance of arrest is justifiable.[1] If, for example, a party apprehended flee or escape and be pursued, the officer is never entitled to kill him, though it has been said that this may be lawfully done where such party has committed a felony or given a dangerous wound.[2] And in case of riots or unlawful assemblies, even irrespective of the riot act, if these cannot be suppressed, except by killing one or more of the rioters, a constable or peace-officer, it is said, may be justified in such an act, though it will be difficult to prove this justification, unless the circumstances are very strong.[3] But a private person ought not of his own authority to take this step, and if it turn out that the party

[1] See *ante*, p. 309.
[2] Hale, 489; 1 Hawk. c. 28, § 11; Fost. 271; 4 Bl. Com. 179.
[3] 1 Hale, P. C. 53, 494; 1 East, c. 5, § 71.

killed is innocent, though the officer might be justified, the private person will not be so.[1]

This doctrine, that a constable or bailiff may kill the party pursued in certain emergencies, has been too lightly dealt with, for it is in substance allowing an officer to take away life without trial or legal sentence, and where possibly the exigency has been entirely created by his own negligence or incompetence; or it may be, that the object in view is contemptible in comparison with human life, such as the imprisoning of a man for a debt, or some petty offence. It is admitted that if a gaoler use cruelty to a prisoner, causing or accelerating the death of the latter, this will be deemed murder.[2]

Killing in correcting children.—Many of the cases of manslaughter arise out of the disproportion between the blow and the effect intended to be produced; and, if what was meant only to punish the body in a slight degree causes death, the fault of this does not fall on the person who misuses his strength or exceeds his aim, whenever it can be attributed to those inevitable accidents which happen amid the great variety of circumstances in life, but which bring no punishment upon any, simply because no want of care can be traced to any individual. If however, parents and masters of schools, though impliedly at common law having authority to administer moderate correction to children, should overstep the limit of moderation either by using too great violence, or moderate violence for too great length of time, or using a dangerous weapon; and if death ensue mainly by reason of the correction, it will be murder.[3] Though when correction is administered, and the degree and force are not out of proportion to the occasion of offence, manslaughter only will be deemed to be committed,[4] as in beating a boy found stealing wood;[5] in ducking a pickpocket;[6] in a father beating a boy who beat his son.[7]

Killing in course of cruel conduct.—In like manner, murder will be committed in case of death by various

[1] 2 Hale, 84; 1 Hale, 489; 1 East c. 5, § 68. [2] Fost. 322; R. *v* Huggins, 2 Str. 882. [3] 1 Hawk. P. C. c. 29, § 5; 1 Hale, P. C. 453, 473. [4] Fost. 291. [5] Holloway's Case, Cro. Car. 131. [6] Fray's Case, 1 Hawk. P. C. c. 31, § 38. [7] Rowley's Case, 12 Rep. 87; 1 Hale, 453; Fost. 294.

kinds of cruel treatment, as by exposing a sick or helpless person, under one's charge, to excessive cold or starvation;[1] by leaving an infant in the fields so that a kite or pig kills it;[2] by neglecting to give food to a helpless child;[3] by putting a prisoner into an unwholesome place, where a distemper is caught;[4] by striking a child or apprentice with a deadly weapon;[5] by beating and tying a child to a horse's tail;[6] by striking a servant with a sword for refusing to deliver up a key;[7] by cruelly ill-using a person so as to bring on some fatal disease.[8] And yet because the facts failed to show cogent evidence of malice, the offence has been reduced to manslaughter, as by merely neglecting a sick person;[9] or by correcting a child so as to bring on consumption.[10] A gaoler is by law bound to supply his prisoner with food,[11] and a master usually to supply food to an apprentice.[12] But it is no implied term of the contract to provide a servant with medicine or medical advice in case of sickness, though it may be so to provide an apprentice.[13] And a master, after treating an apprentice as an apprentice in point of fact, cannot evade liability by proving that the deed of indenture was void.[14] And a servant, supplied with food to give to a young child, but who maliciously refuses to give such food, is guilty of murder.[15] Where, indeed, a parent has no food to give to a young child, it is his or her duty to apply to the parish or union for relief; and if for want of this application the child die, the parent is guilty of at least manslaughter.[16]

In all such cases as these, of causing death by starvation or cruelty to prisoners, children, and helpless persons, it is essential, that there should be at the time a legal duty in the person charged to supply food, or help, or care to the person whose death is caused. Thus a mother is not

1 East, P. C. 225; R. *v* Walters, Car. & M. 164. 2 1 East, P. C. c. 5, § 13. 3 R. *v* Walters, Car. & M. 164; R. *v* Squire, 1 Russ. Cr. 678. 4 R. *v* Huggins, 9 St. Tr. 218. 5 R. *v* Grey, Kel. 64; 1 Hale, P. C. 474. 6 R. *v* Halloway, Cro. Car. 131. 7 R. *v* Keite, L. Raym. 138. 8 R. *v* Self, Leach, 137. 9 R. *v* Marriott, 8 C. & P. 425. 10 R. *v* Cheeseman, 7 C. & P. 455. 11 R. *v* Godwin, 1 Russ. Cr. 563. 12 R. *v* Smith, 8 C. & P. 153; R. *v* Davies, 1 Russ. Cr. 679. 13 Sellen *v* Norman, 4 C. & P. 80; R. *v* Smith, 8 C. & P. 135. 14 R. *v* Davies, Russ. Cr. 679; R. *v* Crumpton, Car. & M. 597. 15 R. *v* Hook, 4 Cox, C. C. 455. 16 R. *v* Mabbett, 5 Cox, C. C. 338.

indictable for letting her infant starve to death, if the father had not supplied her with food to give to the child,[1] though the mother would be liable if the death was caused by her sole personal neglect, as by refusing to suckle the child.[2] And the mere neglect to provide means of preserving a child about to be born is not *per se* evidence of criminal neglect in the mother.[3] And where a wife is separated by agreement, and has an allowance, but comes for shelter and relief to the husband under peculiar circumstances of present destitution, and the husband refuses, and thereby causes her death, there seems no ground for charging him with manslaughter, as there was no duty at the time incumbent on him.[4] And where a female is able to take care of herself, and is in want of medical assistance or a midwife, the person, in whose house such person lives, whether a parent or not, is not criminally liable for neglecting to procure such assistance.[5]

Fighting and duelling is not lawful.—The practice of duelling was for ages and even up to a recent period countenanced by many citizens as a mode of supplying for wounded honour and personal affronts a solution and kind of satisfaction which the law could not give. It was deemed indeed almost degrading to resort to legal tribunals in such cases, though it is the sole object of the law to substitute for every kind of personal vengeance the more equitable judgment of an impartial judge. Yet this disposition to take the law into one's own hands was a cause of trouble to legislatures and governments for centuries.[6] In turbulent ages fighting was the chief business of life.[7]

[1] R. *v* Squire, 1 Russ. Cr. 190; R. *v* Bubb, 4 Cox, C. C. 455; R. *v* Saunders, 7 C. & P. 277. [2] R. *v* Edwards, 8 C. & P. 611.
[3] R. *v* Knights, 2 F. & F. 46. [4] R *v* Plummer, 1 C. & K 600.
[5] R. *v* Shepherd, 1 L. & C. 147.

[6] The Roman gladiators were sometimes condemned as a punishment, while volunteers were also allowed as a pleasure, to fight with each other or wild beasts. These exhibitions were treated as public shows, and were abolished by Constantine.—*Cod.* xi. *tit.* 43. And were finally suppressed by Honorius.—*Theod. Hist.* b. v. c. 20.

[7] In the court of Odin fighting was the amusement of his courtiers all the morning, while drinking in Walhalla was the amusement of the evening. A law of Gundebald, the Burgundian, in 501, enacted that, as a remedy against obstinacy and avarice, all controversies shall be decided by the sword.

Some authors have ventured to defend duelling on the ground that it teaches men to resent injuries, and so polishes manners.[1] But it was more acutely pointed out, that under this practice a man was dishonoured by not resenting an affront, and utterly ruined by resenting it.[2] Most legislatures found duelling becoming an intolerable scandal, and interfered one by one to suppress it.[3] James I. first seriously attempted to put it down.[4] Bacon obtained a decree of the Star Chamber against duellers, and punished them with fine and imprisonment. Duelling, however, revived with the Restoration. In 1713 Queen Anne in a speech said the practice required a speedy and effectual remedy. In 1842 it was recommended that instead of such killing being treated as murder, nothing but imprisonment should follow, and a compensation to the family of the deceased. The practice, however, seems at last to have become obsolete without legislation.[5]

[1] Mandev. F. of Bees, 242. [2] Chesterfield's Letters.

[3] It is related that in ancient Scandinavia the duel, which had previously been the regular legal suit, was discredited by the disastrous issue of a contest between two poets, who quarrelled about a lady and were both killed, whereupon the parliament at once abolished that mode of litigation for ever.—*Mag. Kon. Lag. Bet.* In Sweden, in modern times, the survivor, or survivors, were ordered to be imprisoned and kept on bread and water for two years—a kind of punishment which was said to have had a powerful deterrent effect.—12 *Univ. Mod. Hist.* 216. The Council of Trent ordered all Christians who resorted to duelling to be excommunicated. Charles V. prohibited it. And the parliament of France made an edict against it in 1602.—9 *Univ. Mod. Hist.* 327. Gustavus II., while he consented to preside, at the same time ordered a gallows to be ready for the victor, and this was said to put down the practice in the army.—*Ib.* 321. Louis XIV. decreed death and forfeiture of estate to those who fought duels. The Japanese are said to have cured the pains of wounded honour also, without resorting to a court of law, but in a more conclusive manner. The affronted party, instead of taking his chance of victory in an open fight, began by ripping up his own belly, and the antagonist was bound by the laws of honour to follow the example.—1 *Benth. W.* 379.

[4] 2 Pike on Crime, 141.

[5] None but BACON could so well condense all that need be said on such a subject: "It is a miserable effect when young men, full of towardness and hope, such as the poets call *Auroræ filii*, sons of the morning, in whom the expectation and comfort of their friends consisteth, shall be cast away and destroyed in such a vain manner. But much more it is to be deplored when so much noble and genteel

In the eye of the law a duel under the guise of revenging or defending an affront, was generally treated as nothing but a deliberate attempt to murder an adversary.[1] The deliberation is most conspicuous when there is previous notice and concert; and hence when Lord Morley objected to fighting at the moment of quarrel because of the disadvantage he would labour under from high shoes, this was held to indicate sufficiently the deliberation which implied malice and sustained the indictment for murder.[2] And even if the duel arise out of the heat of quarrel without an interval for reflection, it may stand on the same footing. The choice of deadly weapons, even in such circumstances, is some evidence of malice. Nevertheless, the court has held the crime in several instances to be only manslaughter, when there is something in the circumstances to show that the party killing was acting in self-defence, and neither the aggressor nor the assailed was taking any advantage by weapons.[3] A duel or fight is in almost every point of view deemed illegal, because it is an attempt to supersede the action of a court of justice, and to save the trouble of self-control by adopting a solution which is no solution, but merely trusts partly to chance the gratification of a settled revenge. Hence the excuse that the code of honour or the fear of being deemed a coward, or the importunity of the victim to court his fate, is no ground for mitigating the offence, if death should be the result.[4]

The position of seconds in a duel is the same as that of the principals, and they are equally guilty of murder, for they deliberately assist and promote it by their conduct. At first it was doubted whether they committed more than

blood should be spilt on such follies, as if it were adventured in the field in service of the king and realm, were able to make the fortune of a day and to change the fortune of a kingdom. So we see what a desperate evil this is: it troubleth peace: it disfurnisheth war: it bringeth calamity upon private men, peril upon the state, and contempt upon the law."—*Case of Duels*, 2 *St. Tr.* 1036.

[1] R. *v* Cuddy, 1 C. & K. 210; R. *v* Taverner, 1 Ro. Rep. 360; Kel. 28; 3 Bulstr. 171; R. *v* Young, 8 C. & P. 645. [2] R. *v* Bromwich, 1 Lev. 180; R. *v* L. Morley, 1 Sid. 277; 2 L. Raym. 1496. [3] 1 East, P. C. c. 5, § 25; R. *v* Oneby, 2 Str. 766; 2 L. Raym. 1485; R. *v* Kessal, 1 C. & P. 437. [4] R. *v* Rice, 3 East, 581.

a misdemeanour; but it was settled, so far back as the time of Lord Hale, that they incur the guilt of murderers.[1] Thus the second of the party killed may find himself in the anomalous situation of being indicted for the murder of the very friend, whose quarrel he espoused.[2] Not only are seconds in a duel liable to be indicted for murder, but all other persons who take a part in it by attending, are in the same position, though in order to establish the criminality, something of more active participation must be proved than merely looking on without interference.[3] It is true that in endeavouring to establish that complicity and deliberation against a second, which will involve him in the crime of murder, the circumstances must be looked at, in order to ascertain whether the second was only casually present, and had no share in the transaction. And it follows from the above state of the law, that if the principals be tried, the seconds may, according to the usual rule which protects witnesses against giving evidence tending to criminate themselves, refuse to give evidence, on the ground that their answer will tend to expose them to an indictment. This, however, being merely a personal privilege, may be waived by the second, and if he consent to be sworn, he cannot then refuse to answer.[4]

Killing by sentence of the law.—Homicide is necessarily justified, when the sentence of the law enjoins the death of a malefactor; or rather it is not a case of homicide at all in any legal sense. So long as society assumes the right to kill one of its members, who has violated its laws, and so long as capital punishments are maintained, it is absolutely necessary that some one should be the executioner, and that his act in putting to death the criminal should be beyond question. But even this act must be done with the most rigorous conformity to the legal warrant or authority for so extreme a measure. The first thing, therefore, to justify the executioner, is that there shall be a legal warrant or sentence authorising the execution. And the mode of killing the criminal, as prescribed by that sentence, must be literally complied

[1] 1 Hale, P. C. 443; R. v Young, 8 C. & P. 644. [2] R. v Cuddy, 1 C. & K. 210. [3] R. v Young, 8 C. & P. 644 [4] Ibid.

with, otherwise the officer will be guilty of murder.[1] If the sheriff vary from the judgment; as, where the judgment is, that the prisoner be hanged, and he beheads the party, this is deemed murder. Yet Foster justifies some deviation on the part of the sheriff, and says the common law allows the crown to direct beheading instead of hanging in some special cases; and on this ground, he said, the sheriff was justified in suffering a traitor to hang till he was dead without disembowelling, and a woman to be stifled instead of being burnt alive. And the House of Commons, when debating whether the traitor Stafford should be beheaded only, without disembowelling, consented to this being done by the sheriff. When Colonel Morley, in 1745, after being hanged six minutes, was cut down, and was still found alive, the executioner, after giving in vain several blows on the chest, at last cut his throat.[2] But in Walcot's case, under Charles II., a writ of error was brought and attainder reversed, because the record stated, not that his entrails should be burnt while he was alive, as it should have done, but merely that they should be drawn out of the body.[3]

In some countries ancient and modern the practice is to make a condemned prisoner execute himself. The Athenians thought it proper that the criminal should execute himself. And it is said that Witold, prince of Lituania made a law, that criminals condemned to death should execute the sentence on themselves, for a third person would be guilty of homicide.[4]

The means used for murdering.—As the means of murdering another seem to be infinite, it at first sight requires explanation why it is said that the means used in murder must be some external or visible means, and why it is not the less murder, if the death of another is brought about anyhow, provided cause and effect be clearly traceable. But it is partly due to the infirmity of the senses and

[1] 1 Hale, 433, 454, 466, 501; 2 Hale, 411. [2] Amos, Ruins, 125.
[3] Walcot's Case, 1 Salk. 632.
[4] Cromer, De Reb. Pol. xvi. See further as to this, *post*, Chap. viii. Punishment. It was said that an Athenian executioner, having given his victim sufficient hemlock to cause death, though in fact it did not take effect, refused to provide more till he was paid, and this was so in the case of Phocion.—*Plut. Phoc.*

human evidence, that the law can only deal with coarse visible and tangible facts, and will refuse to inquire into any secret and circuitous modes of compassing another's death, especially if part of the means involves inquiries into the working of the mind, which at most are mysterious and unsusceptible of strict rules. Hence it is said there can be no murder except the means of killing be some external means, such as a stroke, or poison, or exposure, or imprisonment. Digging a pit with the intention that A should fall into it and be killed, is the same as killing A with a blow.[1] So if the fear of immediate violence cause a person to retreat for escape to dangerous places or courses, and he is killed or drowned, this is the same as if the death had been caused directly by the person threatening violence.[2] But there is great difficulty in pushing the doctrine of cause and effect, where the working of the mind is concerned; for the minds of two persons are seldom or never alike, and what is predicable of one might be grossly unjust and inapplicable as to another. Mere words or acts therefore which operate on the mind or feelings, though the immediate occasion or vehicle of death, and though all the malice and malignity exist, will not be reckoned by the law as equivalent to the crime of murder, for all persons are somewhat harshly presumed by the law to be able to control their feelings within bounds on any mere provocation of words, however false or irritating.[3] Where it is the slanderous lie that kills, it is therefore thought to be no murder at all, because it is said no sagacity can penetrate the connection between the hidden workings of the mind and their effect on the body.

Killing by drugs or means of cure.—And for a like reason, namely, the uncertainty in tracing the cause and effect, where a person professing to be skilled in medicine, administers some drug, or performs some operation, so unskilfully as to cause death, this will, in general, in the absence of the grossest recklessness and ignorance, be deemed misadventure, and nothing seems to turn on his

[1] 4 Bl. Com. 35.

[2] R v Pitts, Car. & M. 284; R. v Evans, 1 Russ. Cr. 676.

[3] 1 Hale, P. C. 427; 1 East, c. 5, § 13; R. v Murton, 3 F. & F. 492. See as to perjury killing *post*, p. 370.

not being a qualified practitioner.[1] The connection between the death and the negligence, or unskilfulness, is too obscure to warrant a verdict even of manslaughter, for it is idle to expect that these cures can always be successful; and if the medical man honestly believes he is right, and is not grossly ignorant, he is free from blame.[2] Britton and Coke contributed to the notion, that, if an unlicensed surgeon occasioned the death of his patient, it was felony; and Hale, while treating this as a vulgar error, said it tended to make people cautious.[3]

Killing by keeping dangerous animals.—A somewhat circuitous means of murder occurs in the case of letting loose a fierce animal. Where a man keeps a fierce animal and lets it loose, so that it kills some one, this will be murder or manslaughter, according to the conduct shown, for there is, in such cases, no difficulty in tracing cause and effect.[4] To let loose such wild animal in a crowd, or to fire into a crowd, was said by Hale to be an example of malice in law, and the killing to be murder. And Foster said that, whenever an action, unlawful in itself, is done deliberately and with an intention to do mischief or great bodily harm to individuals, or of mischief indiscriminately, fall where it may, and death ensue against and beside the original intention of the party, it will be murder.[5]

Killing by communicating infectious disease.—It was formerly held, that a person, who goes about knowingly with an infectious disease like the plague, is not guilty of manslaughter at common law, if he thereby cause another's death,[6] though Hale admits (or at least doubts the contrary) that if one go about purposely to infect another, then it may be murder; and, though he do it not purposely, still

[1] 1 Hale, 429; R. *v* Long, 4 C. & P. 398; R. *v* Crick, 1 F. & F. 519; Lamphier *v* Phipos, 8 C. & P. 475. [2] See also *ante*, p. 82.

[3] Sometimes in proving the gross ignorance which is relied upon as implying criminal responsibility, it is attempted to give evidence that the same person had not been successful in other cases with a like treatment; but this, according to the rules of evidence, is inadmissible.—R. *v* Whitehead, 3 C. & K. 202.

[4] 1 Hawk. P. C. c. 31, § 8. See *ante*, p. 70.

[5] Foster, C. C. 261. And the Mosaic law said, that if the owner of an ox knew that it pushed with its horn, and did not keep it in, and it killed a man or woman, not only the ox, but the owner was to be put to death.—*Exod.* xxi. 9. [6] 1 Hale, P. C. 432.

it may be a misdemeanour. This glaring defect of the common law was fortunately remedied in 1603 by a statute which ordered an infected person to keep his house, and taxed the inhabitants for means to keep in houses for the purpose such as were so infected; and if the infected person went abroad, he might be arrested as a felon.[1] And under that statute, a writ *de leproso amovendo* could be obtained to seize and imprison a leprous person, and if he went about, he could even be killed with impunity.[2] The quarantine laws or statutes had also no other object than to prevent infected persons going abroad from foreign vessels, and spreading some deadly disease on unsuspecting people. A master of such vessel is subject to a penalty of 400*l.* for quitting, or allowing his passenger to quit, or not going to the appointed place; and the passenger may also be imprisoned six months, and forfeits 300*l.*[3]

In modern times it has been held to be an indictable offence for one suffering from a contagious disease, such as small-pox, to be unlawfully or without necessity in a public place where infection may be communicated.[4] But this is too small a protection to mankind; and hence the legislature has come to the aid of human life with supplementary details. Each sanitary authority is authorised to provide proper conveyances for carrying infected persons through streets; and if such persons are without a proper lodging, then of removing them to an hospital. And a person suffering from a dangerous infectious disorder, who wilfully exposes himself in streets and public places, or enters public conveyances without proper precautions, is subjected to a penalty of five pounds. And for like reasons a penalty of twenty pounds is imposed on those who let houses and lodgings, which they know to be tainted with infectious disorders.[5]

Killing by swearing away another's life.—Perjury also may kill one. Thus if a witness falsely swear away life, and thereby cause an innocent person to be condemned and executed, he may be convicted of murder; and such seems to have been the ancient law,[6] as well as the opinion of Lord

[1] 1 Jas. I. c. 31; 3 Ch. I. c. 4; 16 Ch. I. c. 4, repealed in 1837.
[2] Heath arg., Stroud's Case, 3 St. Tr. 284.
[3] 6 Geo. IV. c. 78.
[4] R. *v* Vantandillo, 4 M. & S 73; R. *v* Burnet, 4 M. & S. 272.
[5] 38 & 39 Vic. c. 55, §§ 120–129.
[6] Mirror, c. 1, § 9; Brit. c. 52; Bract. lib. iii. c. 4; 1 Hawk. P. C. c. 31, § 7; 3 Inst. 91, 224.

Mansfield and of Blackstone. But Foster, while observing that ancient writers are of uncertain authority on the subject of homicide, seems to think this offence, if it be one, only cognizable *in foro cœli*; and that, if it had been law it was singular that the enemies of Titus Oates had never thought of bringing it to bear on him.[1] But the old common law scarcely doubted that this kind of killing was a capital offence, and Coke says, as David killed Uriah with his pen, so such men kill one with their tongue. In cases of this kind it is not enough to say, that no visible or physical means are used, and so there can be no murder, for that rule depends, not on any importance as to the visibility of the means so much as the difficulty of tracing cause and effect. Here the deliberation and intent are ready to hand. And though perjury has its appointed mode of punishing false evidence, yet if the death is shown clearly to be a consequence of the act of false swearing, there seems no possible reason why murder should not be committed in this way. To say that a man should not be punished for one crime, because he by the same act committed also another, seems to be untenable. Though some cases, therefore, of doubtful authority encouraged the notion, that murder cannot be committed by mere words, there seems no ground for restricting the proof of murder to any particular means, so long as the connection of cause and effect is clearly demonstrated by such evidence as all mankind agree to be sufficient. There is and can be no magical importance attributable to any one out of the great variety of means open to the craft and ingenuity of malignant minds. Indeed, murder by poisoning at first differed little in the kind and cogency of its evidence from murder by words and speeches; and the operation of poisons was long equally mysterious and inscrutable, till chemical science and post-mortem examinations reduced it to rules and observations easily followed and traced out.

Poison as a means of murder.—Though murder by poison seems in modern law to differ in no conspicuous quality from other kinds of murder, it seems to have not been included in the earliest notions of murder. Probably at first murder was practised chiefly by blows, and swords,

[1] Foster, Rep. 131; 1 Leach, 44; 1 East, P. C. c. 5, § 94; 4 Bl. Com. 196.

and weapons of offence. In our own law it has been said, that poisoning was thought not to be included in the category of murder, because it was not done by the hand of man. The first statute of 22 Henry VIII., c. 9, which ordered a wilful poisoner to be boiled to death, was passed in consequence of a cook, named Richard Roose, having poisoned a pot of porridge prepared for the Bishop of Rochester and his family, as well as the poor of the parish, on which occasion seventeen persons died. The cook's trade probably suggested the mode of death, but poison as a means of murder was no longer to be passed over by the law.[1] The statute of Henry VIII. was repealed by one of Edward VI., which expressly declared killing by poisoning to be murder, and so included it in the common category; and enactments to the same effect have been continued to the present day.[2] The murdering of a person by poison does not substantially differ from other cases, except in the peculiarity of the means by which poison operates. Poison is generally administered secretly, and a train of circumstances often intervenes between the original design and its execution. The essence of the crime lies in the deliberate intention, that the poison shall be so placed, that, by the operation of ordinary laws and in the usual course of affairs it will enter the body and cause death; and the fatal end is easily connected, if the poisoner has laid his train in a manner calculated to produce the effect intended.[3] But it has been found, that between the laying of the poison and the effect produced very many accidents intervene. The intent may be so imperfectly worked out, owing to the production, not of a fatal, but only an injurious effect, or possibly a mere abortive result altogether—the sequence of events may be so easily modified by supervening and unexpected interruptions—and the connection between the malicious design conceived and the final effect on the intended victim may be so obscure and remote, that a special enactment has been made to assign a more definite punishment to the different

[1] Barringt. Stat. 525.

[2] 1 Ed. VI. c. 12; 24 & 25 Vic. c. 100, § 11. In the Welsh laws of the sixteenth century, if a convicted poisoner could not pay a double composition fine, he might be hanged, burned, or slain.—*Welsh Laws*, b. iv. c. 3.

[3] 1 East, P. C. §§ 12, 30; 4 Bl. Com. 200.

situations. And more frequently the offence assumes the form of an attempt to murder rather than murder itself. Consequently the subject will be found more appropriately treated under this last head.[1]

Killing must be consequence of the act charged.—There are many instances in which the murder of the individual has not been deliberately intended by the accused; nevertheless, if some other felonious act has been done, and the immediate consequence thereof is the death of such individual, the law views such death as if it were immediately and wilfully caused—the doctrine being, that every man must have intended the natural consequences of his act, and if one of such consequences be the death of a third person, then the doer of the act which immediately caused it is a murderer. But if the death is not one of the natural consequences of the felonious act, then the crime committed has been said to be not murder, but only manslaughter, and perhaps not even that.[2] It often happens, as formerly stated, that an illegal act miscarries, as to the individual intended to be murdered, and takes effect against one who was not so intended, and thus a person is killed partly by mistake for some other person. In such cases the law, by the doctrine which may be called a transmutation of motives, imputes to the perpetrator the same guilty malice towards the person killed as actually existed against the person intended to be killed.[3]

Killing in order to be murder must be within the year.—In tracing the connection between the death and the murderous blow, many legislatures have thought it incumbent to put some limit to the time during which this sequence of events must take effect. A statute of Henry VII. enacted, that murderers should be prosecuted within the year and day, though if acquitted, they might be kept in prison till the year and day passed; and the wife or heir anciently had a right of appeal within that time.[4] Hale

[1] See *post*, Attempts to Murder. [2] R. *v* Horsey, 3 F. & F. 287.
[3] R. *v* Lewis, 6 C & P. 161; Foster, 262; Kel. 111; 1 Hale, P. C. 441; R. *v* Saunders, Plowd. 474. See *ante*, p. 338.
[4] 3 Hen. VII. c. 2. In Bretagne the time of death must be within forty days, and in Lucca thirty days, and in the Stabbing Act of 2 Jas. I. c. 7, the death must have ensued within six months.—*Barringt. Stat.* 527. To get rid of difficulties like these, the Chinese

gives as the reason, why it is no murder, if the wounded do not die within year and day, that it cannot be discerned, as the law presumes, whether the death was violent or natural. In other words, if the death does not follow within that time, the connection between cause and effect is too remote and uncertain, and the evidence can never be sufficiently cogent to satisfy the mind. The application of such an arbitrary rule, which fixes on a mere limit of time as a criterion of cause and effect has unavoidably led to certain difficulties; for it is obvious there may be wounds, which, if carefully treated, might be cured, and if otherwise might be fatal. A slight blow may kill a sick person which would be harmless to a sound person; and hence further distinctions* require to be made to meet the variations arising out of the state of the wounded person, and the different complexion given to the consequences of the wound. Where, therefore, a death has occurred, which is attributed to a wound given within a year and day previous, there seem to be two questions: (1) whether the wound was in itself mortal, that is, in the ordinary state of things, in all probability calculated to cause death; (2) whether the treatment of the wound was so careless, having regard to the reasonable means of care available to the wounded party, that the death is to be attributed to this careless treatment, or some supervening cause irrespective of the wound, rather than to the wound itself. In tracing the progress of the wound, it seems reasonable, that the accidents of life and the circumstances of the party as to health and otherwise should not be used to clear the party of the crime of murder; but should rather be used in favour of the party who has died; for the law is bound to protect the life of the careless and the careful, the sick and the sound, the odious and the virtuous, the poor and the rich alike; and the crime which in its essence existed if at all at the beginning, in the intent of the party wounding, should not be left to vary with the hazard of so many obscure

code allowed the magistrates, when inquiring into the case of wounding, to fix the number of days during which the responsibility of the accused should last; and if the injured party died after that period, the offender should not be punished for a capital offence, but according to a lower scale of punishment.—*Staunton*, *Code*, 328.

sequences of events.[1] Lord Hale said, that a man is not to be permitted to apportion his own wrong.[2] Hence, where a blow accelerated the death of a sick person—[3] where a death was accelerated by administering Morison's pills to a person suffering from small-pox,[4] it was held that murder was committed. And little regard is to be paid to any attempt of those, charged with murder, to show that the wounded person might have recovered if he had submitted to a surgical operation;[5] or if his wounds had been properly treated;[6] or if the brandy necessarily administered had not entered the lungs and so caused the death.[7] If it happen that the wounded person does not recover, the guilt of murder will be the same, for due care cannot always be secured as a consequence of a dangerous wound, and it is right that that risk should be with him who caused it.[8]

Killing proved only when evidence of body found.—It has been said to be a rule, that no conviction for murder can be sustained, unless the body of the alleged murdered person has been first found;[9] and Hale says it was a rule of the civil law also.[10] This, however, is rather a rule of evidence or a maxim of caution; for, until there is some satisfactory proof that the murder was certainly committed, it would be idle to prove that the defendant committed it.[11] It cannot, however, be laid down, that in no case can the murderer be convicted till the body of his victim be found, for the death may be proved by secondary evidence or by the circumstances of the death. And this was held to be sufficiently made out, where the deceased was thrown into the sea under circumstances which showed the body to be then dead.[12] In such cases it is usual to call every witness who was present at the time of the alleged murder, so as to acquire the most certain knowledge of this preliminary fact.[13] And until the body has been found,

[1] 1 Hale, P. C. 428; Rew's Case, Kel. 26. [2] 1 Hale, P. C. 428. [3] R. v Martin, 5 C. & P. 128; R. v Murton, 3 F. & F. 492. [4] R. v Webb, 1 M. & Rob. 405. [5] R. v Holland, 2 M. & Rob. 351. [6] R. v Reading, 1 Keb. 17; R. v Rew, Kel. 26; R. v Pym, 1 Cox, C. C. 339. [7] R. v McIntyre, 2 Cox, C. C. 379. [8] R. v Tinckler, 1 East, P. C. 230; R. v West, 2 C. & K. 784. [9] 2 Hale, 290. [10] Dig. xxix. 5, 24. [11] R. v Hopkins 8 C. & P. 591. [12] R. v Hindmarsh, Leach, 569. [13] R. v Holden, 8 C. & P. 606.

there is no rule of law, requiring an absolute presumption of guilt to be drawn from the fact, that the prisoner has not accounted for the body, though last traced to his control.[1]

Hale mentions however cases showing what great caution is required, when the dead body has not been with certainty traced; as where a cruel uncle corrected his niece, who ran away, and in his desperation he dressed up another child to resemble the lost one, who in full time returned and claimed her estate, the uncle having been meanwhile executed for her murder.[2] In another case B was tried and executed for murdering A by burning him in an oven, the truth being that A had been sent by B beyond sea, and afterwards returned. In another case some men were tried and executed for murdering their captain and seizing his ship, the fact being that the captain had gone ashore on an island and was kept by the natives.[3] And three persons were tried and executed for the murder of a gentleman, who had been in his walks suddenly seized by robbers and taken to foreign countries.[4]

Death by accident or misadventure.—Viewing the subject of death by misadventure apart from its historical treatment, it may be described negatively as including all such cases of homicide as do not amount to manslaughter or murder, or any negligent actionable wrong, and do not flow from any lawful conduct or business of the killer. There are many occasions in life, where the facts are so imperfectly understood, that it is impossible to say at first whether murder or manslaughter has been committed. But when, with or without full inquiry, the conclusion is arrived at, that neither of these crimes was committed, then the further conclusion follows as of course that the person, whose act occasioned the death of another is entirely free from guilt, though not free from civil liability owing to negligence. There is no middle course between the crime of manslaughter and entire freedom from criminal responsibility. His act may have been one of a chain of events —or it may have immediately preceded the death—but

[1] R. v Hopkins, 8 C. & P. 591; R. v Cheverton, 2 F. & F. 833.
[2] 3 Inst. c. 104. [3] 10 Parl. Hist. 284. [4] Perry's Case, 14 St. Tr. 1320.

there being no logical connection between the two events in the eye of the law, the whole circumstances must be viewed in the same light as if the dispensations of Providence had proceeded in their own order, irrespective of the volition of man, and as if the death of the one person happened naturally and in no other sense to follow the act of the other. There was a sequence of events, but no cause and effect. Why this sequence should have occurred it is vain to inquire further, since the decrees of Providence are at once beyond all scrutiny.

It is to be borne in mind however, as formerly mentioned, that though there is no alternative between murder and manslaughter on the one hand and mere fortuitous accident on the other, this does not imply, that there may not be such negligence as will support a civil action. The negligence that may be blameless in one view may be blamable in another: and indeed it is difficult to draw the line of demarcation clearly between actionable negligence and negligence not criminal. It seems only one of degree, and yet that degree is scarcely capable of clear expression. The negligence, the recklessness, the utter want of judgment and circumspection, are only a little less in the one case than the other, yet this makes all the difference between the two remedies. The actions for negligence may thus be said to fill up a large space lying between manslaughter on the one hand and misadventure or pure accident on the other hand.

Ancient laws confounded accidental death with murder.— Though it may seem a truism to modern civilisation, that death to one man may be caused by the act of another man, and yet no blame whatever may arise, being what is deemed the merest accident, which no wisdom and care can wholly avoid, yet most ancient nations, including our own, could not draw this nice distinction. Barbarism cannot afford the necessary thought to go into niceties of degrees of culpability; and hence whenever one man was in any sense mixed up in the death of another, one indiscriminate conclusion was drawn, that he was guilty—his punishment could not be passed over—and some kind of expiation must be demanded. And somewhat singular, if not childish, were the practices and expedients by which they gave effect to this conscious and inarticulate

ban, under which all kinds of manslayers were singled out and punished.[1]

The same want of discrimination in early English law.—In our own early law we find the traces of the same modes of thinking. Misfortune was recognised in the time of Henry III. as a ground of exemption from the murder fine.[2] And a king's pardon was required to exempt the unfortunate author of an accidental death from the guilt of murder. The slayer of a thief or burglar, or of a person in chance-medley, was expressly declared by a statute of Henry VIII. not to forfeit his lands or goods. but was to be acquitted.[3] And a bill was introduced in Queen Elizabeth's time, to exempt one, who killed another at a certain sport, from forfeiture of goods or chattels.[4] In short, homicide by accident or misadventure used in our early law to be punishable by forfeiture of goods and chattels. Coke, Hale, and Blackstone try to explain away this by saying, that though it is but a man's misfortune, yet the king has lost a subject by the accident, and the man who caused the accident ought to have been

[1] In the law of Moses homicide was distinguished as deliberate or deceitful, as culpable, and as fortuitous. The first was punished with death, the second only with exile or confinement in a city of refuge until the death of the high priest.—*Numb.* xxxv. 23, *Deut.* xix. 4, 6, 11, *Exod.* xxi. 14. Herodotus said that Adrastus, owing to his killing his brother by accident, was banished and dispossessed, and fled to the court of Crœsus, desiring to be purified of blood.—*Herod.* b. i. And the banishment lasted for a year. And Homer mentions the horror of spectators as a manslayer fled to a foreign country.—*Iliad*, b. xiii. 24. And though the Roman law took little notice of involuntary or accidental homicide, the Church soon introduced a deeper sense of the sacredness of life, and treated jealously what might otherwise pass without censure. Thus though a master was admitted to have the power of beating a slave, yet even though there was no malice aforethought, or unfairness in the means of punishment, the ecclesiastical law treated such killing as a ground of penance.—*Bing. Chr. Antiq.* b. c. xix. 10. In Japan also accidental homicide subjected the unfortunate author to death equally with the deliberate murderer, the only difference being, that he was in the former case allowed to be his own executioner.—*Barringt. Stat.* 71. And latterly he was subject to banishment.—*Dickson's Japan*, 341. And among the Kaffirs no distinction was made between wilful murder and any other homicide.—*Maclean's Kaffirs*, 60. In Benin, Africa, where a man was killed, a slave was killed to appease the dead man's ghost.—6 *Univ. Mod. Hist.* 583.

[2] Stat. Prov. 43 Hen. III. § 25.

[3] 24 Hen. VIII. c. 5.

[4] 8 Eliz.; 1 Parl. Hist. 717.

more careful. Hence he forfeited his goods to the king by way of learning the lesson of taking greater care.[1] But a statute of George IV. treated these attempts to put the best face on a bad law as valueless and repealed the law altogether, setting the case on its right footing as one of mere accident and carrying blame to none.

These cases of death by misadventure thus come into view, wherever the facts have failed to involve such fault or negligence as forms the ingredient of manslaughter; as, for example, where workmen without blame killed a person passing in an unfrequented place:[2] where the head of a hatchet flies off and kills a bystander: where a driver in the dark drives over a person: where a sportsman shoots at something moving, and not suspected to be a human creature: where a gun goes off when examining it, or turns out to be loaded, without the knowledge of the user: where a child is being reasonably corrected, but by some unforeseen calculation the stroke proves fatal: where in shooting at a butt, some person comes unawares within range, and is killed. In these and numerous cases, embracing the diversified situations in life, the law first jealously looks at the whole circumstances, and if satisfied that the person, whose act causes the death, was not deficient in reasonable care and forethought—that he did not omit anything which he ought to do, and did not do anything which he ought to have omitted—treats the calamity as entirely unforeseen and fortuitous. Human foresight is only conditionally wise, and the law does not exact impossibilities, and accepts and makes the best of the frailties of human nature. No one is held to warrant, at the risk of his own life, that he will always act in every conceivable situation of life so as not to cause the death of any other human creature, for in order to do this omniscience and omnipotence must be required.

Difficulties of the ancients in punishing homicide.—Nothing seems to have perplexed ancient nations so much as the mode of dealing with murderers, and with the death of one human being when caused by another's act; and three remarkable features of their law deserve some notice, though the ideas they represented have been long unknown

[1] 2 Inst. 148. [2] 1 Hale, P. C. 472; 1 Hawk. P C. c. 29, § 4; Fost. 262; 1 East, P. C. c. 5, § 38.

to modern civilisation. It appears that all modern nations passed through the same stages of thought on this subject in their earlier history. These three stages related to the practice of the blood avenger, and cities of refuge or sanctuaries—the practice of paying a murder-fine, which was partly substituted for the former—and the practice of deodands, or confiscation of the thing which was instrumental in causing the death.

The notion of a blood avenger.—Among the ancient and barbarous nations, whether a man was slain by accident or not, the wisest course that occurred to them was to let the nearest relative of the dead man have his will, and kill or assassinate the slayer, and often the slayer's relatives also, without mercy or compunction, or the formality of trial, or even an hour's breathing time. It was at a later period generally deemed but fair, that the doomed man should have one chance for his life; and hence, if by superior speed or skill he could outrun the avenger for a certain distance and reach a city of refuge or sanctuary, then he was not to be murdered, but to be let alone, at least for a time, till he banished himself in due course from the country. The practice of a blood avenger seems traditionary in every ancient society.[1] The punishment of murder was left by the law of Moses to the blood avenger, who felt bound in honour to slay the murderer whenever and wherever he could find him.[2] Where no blood avenger appeared, or he was dilatory, the magistrate was bound himself to punish the murderer.[3] The mode of slaying the murderer was not subject to restriction, being left to the avenger. But though other nations afterwards allowed the murderer to offer a sum of money as expiation, this was expressly forbidden by Moses.[4]

[1] Du Boys, Dr. Cr. 696. [2] Gen. ix. 5, 6. [3] Michaelis Com. 233.

[4] Numb. xxxv. 31; Deut. xix. 6; Josh. xx. 5. The Arabs were said to have a belief, which seemed also recognised by David, that no dew falls on a place where a murder has been committed until the blood has been avenged.—2 *Sam.* i. 21. The office of the blood avenger was also seen among the ancient Greeks.—*Plato*, *De Leg.* 9. The relatives incurred a fine, if they did not prosecute the criminal, unless the deceased had forgiven the act as unintentional. Among the ancient Scandinavians a man and his relatives would lose their reputation, if they did not avenge the

The murderer's relatives also punished.—The practice of punishing parents for the crimes of children, and children for the crimes of parents, and other relatives besides, was also a common notion of justice among ancient nations; the reason being supposed to be that the spirit of revenge is so insatiable, that nothing less than the blood also of those who were supposed dear to the criminal could satisfy the blood avenger. But Moses prohibited this barbarous custom;[1] at the same time, whenever a person was found murdered in the fields, the magistrates of the nearest city were bound to make a solemn avowal of their utter ignorance of the murderer, as well as to perform certain ceremonies amounting to expiation.[2] To this day the natives of Central Africa and of America put to death the relatives of a man found dead.[3] The ancient Macedonians also punished the relatives and children.[4] It ought not,

kinsman's death. But gradually magistrates were appointed, who obliged the offended person to accept a present as a composition from the aggressor, which composition varied according to the rank of the slain.—1 *Mallet's North. Antiq.* 184. And among the savages of Australia it was deemed the holiest duty to avenge the death of a relative, and it was a disgrace not to do so.—2 *Grey's Austr.* 240. In ancient Abyssinia, when a criminal was pierced to death by lances, the relatives of the murdered had the first thrust. But the prosecutor often held a feast, and in the presence of the doomed man discussed the details of the intended cruelties to be shortly inflicted on him.—6 *Univ. Mod. Hist.* 215.

Besides the composition to relatives for murder and personal injuries, the codes of barbarians required a certain duty, called *fredum* to be paid by way of acknowledgment of protection against the right of prosecution, and *fred* in Swedish signifies peace.—*Montesq.* b. xxx. c. 20. Clotharius, about 595, made a wise decree, forbidding a person robbed to receive a clandestine composition without an order of a judge. These fines became according to the laws of the Franks, a source of revenue to the lord.—*Ibid.* c. 19, 20. St. Louis of France, about 1248, in the custom of Beauvoisin, with a view to prevent the avenging of crime, ordered a truce of forty days to intervene before any step could be taken.—3 *Guizot Civ. Fr. lect.* 14.

[1] Deut. xxiv. 16; 2 Kings, ix. 26; xiv. 5, 6; Josh. vii. 24, 25.

[2] Deut. xxi. 1–9. [3] 1 Schwenf. 307; 1 Bancr. Nat. Rac. 702.

[4] Q. Curt. b. vi. In Cochin China and Japan, for some of the higher crimes, the relatives of the criminal were also executed.—8 *Pink. Voy.* 481; *Dickson's Japan*, 256. And in China, in cases of treason, all the near male relatives above sixteen, and other relatives if living under the same roof, were indiscriminately beheaded also, and the children sold as slaves.—*Staunton's Code*, 269. And the

however, to be forgotten, that Bion, one of the seven wise men, said it was as absurd to punish children for the faults of their fathers as to give physic to one, to cure another.[1]

Cities of refuge and sanctuaries qualified the ancient barbarities of blood avenging.—It is not to be wondered, that contemporaneously with, and as some check on the savage rage of the blood avenger, the idea should have occurred of giving one chance of life to the guilty man so soon to be done to death. This idea ultimately took shape in the practice of sanctuaries.[2] Montesquieu said this practice

same in Japan.—4 *Univ. Mod. Hist.* 15. In Peru, where the fathers were punished for the crimes of the children, the reason given was that the parental power ought to have been sufficient to prevent the crime.—*Montesq.* b. vi. c. 20. In rude savage tribes of the present day it is observed, that, if a murderer cannot be found, the next best thing in their view is to kill his relations, and in their minds guilt goes by clans.—2 *Grey's Austr.* 238. In ancient Abyssinia, if a murder could not be proved against any one, all the inhabitants of the place were severely fined or flogged.—6 *Univ. Mod. Hist.* 215. The Brehon laws provided, that, if a teacher for hire instructed a stranger, he was responsible for the pupil's crimes.—2 *O'Curry*, 79.

[1] Plut. De Ser.

[2] Moses mitigated the coarser incidents of the barbarous practice of blood avenging by providing cities of refuge to which the pursued might flee and be safe.—*Numb.* xxxv. 9–35; *Deut.* xix. 1–10. Where indeed the murder was deliberate and violent, the criminal was to be torn even from the altar and put to death.—*Exod.* xxi. 14. But in other cases Moses provided, that the roads should be kept straight and in good order, to give the criminal a fair chance of escape. —*Deut.* xix. 3. The escape thus in reality depended on the relative speed and dexterity of the parties. If the criminal first reached the city of refuge, he was entitled to have the circumstances investigated, and if it appeared to be an accidental or not a culpable death, he was entitled to protection if he kept within the city, or 1,000 ells from it. If he strayed beyond that sacred fence the blood avenger might at discretion slay him.—*Numb.* xxxv. 26, 27. But if the exile remained until the death of the priest, he was free then to return to his home, and the blood avenger could no longer prosecute the suit. Among the ancient Egyptians, even slaves were safe in fleeing to the temple.—*Herod.* B. 2. The Greeks allowed the guilty as well as the innocent to betake themselves to an asylum, and the temples were so abused by the rabble of profligates, that, when the Greek cities sent deputies to the Roman Senate to defend their ancient rights of immunity, Tacitus gloried in the spectacle of these ordinances of kings and ceremonies of gods being with a strong hand overruled and suppressed.—*Tac. Ann.* b. iii. c. 36. But the practice kept its ground. Honorius forbade any one to molest persons taking sanctuary.—*Cod. Just.* i. 12, 2.

of sanctuaries for criminals was civilising, owing to its allowing expiation and satisfaction for murder; for in Malacca, where none was allowed, the murderer, being certain of being assassinated, abandoned himself to fury and killed or wounded all he met.[1] But Beccaria says nevertheless, that sanctuaries are opposed to the public good, and that history informs us, that from the use of them have arisen the greatest revolutions in kingdoms and in opinions.[2]

The privilege of sanctuary was recognised in the laws of King Ethelred, who permitted one, who had forfeited his life and sought a church, to preserve his life either by paying

Three conditions of the privilege of sanctuary were, that the fugitive was not to flee with his arms upon him, nor to use any indecent clamour, nor to eat or lodge in the church, otherwise force of arms was used to eject him.—*Cod. Theod.* lib. ix. tit. 45, leg. 4; *Cod. Justin*, lib. i. tit. 12, leg. 8. Early in the Christian era churches became well established sanctuaries. It is said that there are no laws relating to this matter earlier than Theodosius, A.D. 392, though his law is rather a regulation of an existing practice than the creation of a new right.—*Bingham, Christ. Antiq.* b. viii. c. 11. The Theodosian code recognises not only the altar of the church, but the whole space between the outward walls, as well as the appurtenances and houses of the bishop and clergy, as part of the privileged area. And, indeed, not only churches, but the statues of emperors, the bishop's house, the sepulchres of the dead, schools, monasteries, and hospitals, shared the sacred privilege of asylum.—*Rittershus. de Asylis.* c. 3.

This privilege was not intended to shield the fugitive from legal process, but rather to give time for preparing a defence and for claiming any exemption, such as bishops might insist upon. And thirty days' protection was deemed by Justinian ample time to end any controversy before a civil judge.—*Justin. Novel.* xvii. c. 6. And only three days by King Alfred.—*Lambard De Legib. Angl.* 28. And during this interval, if the refugee was poor, he was maintained by the Church. There were, however, some crimes deemed too grave to suffer any such immunity. Such were peculators and defaulters of public money.—*Cod. Theod.* lib. ix. tit. 45. Jewish debtors, or criminals who pretended to be Christian converts, in order to claim the privilege, heretics and apostates, slaves fleeing from their masters, robbers, murderers, ravishers, and adulterers could be seized and torn from the very altar. So that during the early centuries of Christianity the main object of sanctuary was only to give a temporary respite to the oppressed and the innocent, at the intercession of the clergy, but not to shield those, who had committed all kinds of misdeeds and licentiousness indiscrimately, or to the extent to which the practice was abused in later times.—*Decret. Greg.* lib. iii. tit. 49, c. 6; *Gothofred. Com. in Cod. Th.* lib. ix. tit. 45, leg. 5.

[1] Montesq. b. xxiv. c. 17. [2] Becc. c. 35.

a fine, by perpetual thraldom, or by imprisonment.[1] The early rules as to sanctuary were, that whenever a person committed a felony he might flee to a church, where he was said to take sanctuary. It was the coroner's duty to go and inquire into the case, and if the felon would neither confess his crime nor come out of the church to be amenable to justice, his land and goods were liable to be seized, the former by the crown, and the latter to be given to the township. If the felon remained in sanctuary above forty days after the coroner's visit, the county was bound to keep him in custody, and he was held convicted. But he might during that interval pray to abjure the realm, in which case, after confessing the felony at the gate of the church, he was allowed a reasonable time peaceably to depart from the realm, never to return without the king's licence. He was protected while setting out to the nearest port which he or the coroner appointed, turning neither to the right nor the left, going with a wooden cross in his hand, bareheaded, barefooted, and ungirded.[2]

The privilege of sanctuary seems to have at times shocked the sense of justice even of the earliest ages. But Edward II. would not allow the privilege to be disturbed.[3] The privilege was at last taken away from those guilty of treason, and from pirates and heretics.[4] As a next stage, all sanctuaries except parish churches, churchyards, cathedral churches, hospitals, and dedicated chapels, and places to be named, were abolished. Certain places were declared to be sanctuaries for all offenders except in murder, rape,

[1] Laws, K. Ethelred, § 16.

[2] Britt. b. i. c. 17; Bract. 136; Fleta, 45; 1 Year Book, 30 Ed. I. 509. A statute of Henry VIII. required the coroner to mark with a hot iron the letter A on the brawn or thumb of the right hand of the party leaving sanctuary.—21 Hen. VIII. c. 2. But an act next year, reciting the mischief of abjured persons going abroad and teaching foreigners, limited the party to one sanctuary for life declared by the coroner.—22 Hen. VIII. c. 14. And as a further watch on these persons, they were ordered to wear a badge of ten inches square on their upper garment when out of sanctuary, and neither to wear weapons nor to be out after dark.—27 Hen. VIII. c. 19.

[3] 9 Ed. II. Art. Cler. 10. In 1312, at Newcastle, a person who violated sanctuary was ordered by the Bishop of Durham to go with bare head and foot, and be scourged at the church-door by the curate in presence of the whole congregation.—*Innes, Scot. Mid. Ag.* 195.

[4] 28 Hen. VIII. c. 7, § 13; 28 Hen. VIII. c. 15; 31 Hen. VIII. c. 14.

burglary, robbery, and common sacrilege.[1] And finally in 1623 all privilege of sanctuary was utterly abolished.[2]

Ancient practice as to accepting fines for murder.—There was a time when all punishments were pecuniary; the crimes of the subjects were the inheritance of the prince.[3] Tacitus says, among the ancient Germans homicide was atoned for by a fine of cattle, and the whole house of the slain got a share in the indemnity.[4] Murder at a later stage among the German races was also satisfied by a fine, but under the empire of Charlemagne it was punished with death.[5]

Ancient English law as to fines for murder and sanctuaries.—It is said to have been the ancient law of Ireland, that until St. Patrick civilised the inhabitants, there was no law admitting any composition for homicide, and death was paid with death. St. Patrick introduced a new idea (or perhaps rather adapted only an old idea), when he permitted the criminal to escape by paying a composition, or *eric*, which his friends usually raised for him. If he could not raise it, the criminal was put into a boat and set

[1] These places were Wells, Westminster, Manchester, Northampton, Norwich, York, Derby, and Launceston, in each of which twenty men were allowed.—32 Hen. VIII. c. 12. But owing to the evils of these sanctuary men sallying out and committing crimes, Manchester was abolished, and Westchester substituted.—33 Hen. VIII. c. 15. Plowden resisted the abolition.—5 *Ph. & M.*; 1 *Parl. Hist.* 630. It was owing to enormous abuses that Whitefriars was abolished.—5 *Parl. Hist.* 1161.

[2] 21 Jas. I. c. 28, § 7.

[3] Beccaria, c. 17.

[4] Tac. Germ. c. 12, 21, 22.

[5] Gibbon, Rom. Emp. c. 38. Responsibility for crime was an affair of money with the Kaffirs, and if the offender was too poor to pay, then his relatives were to do so either at once, or the debt was registered against them—each clan being responsible to its chief, and every hut or household for each member.—*Maclean's Kaffirs*, 37. It is said also that among the Moguls, though a *wergild* was payable to the relatives, yet it was deemed dishonourable to claim it.—*Barringt. Stat.* 466. Among the North American Indians, if a man was murdered his family alone had the right of taking satisfaction, the rulers having nothing to do with the course of action.—*Trans. Americ. Soc.* vol. i. p. 281. In Australia the criminal could compound for his crime by submitting himself to the ordeal of having spears thrown at him by all persons who felt aggrieved, or by permitting spears to be thrust through certain parts of the body, as the calf of the leg, or under the arm, and the amount of punishment was accurately restricted to the nature of the crime.—*Grey's Austr.* vol. ii. p. 243.

adrift on the sea.[1] In ancient Wales the composition for murder was assessed in a systematic manner among the relatives of the murderer, and the laws allowed relations to the sixth cousin to be included in the joint liability.[2] And a fortnight as a limitation of time was allowed for the avenger.[3] The law or custom by which the kindred of a person killed felt it their duty and a point of honour to avenge his death and pursue the murderer was prominent among our Saxon ancestors before and after the Conquest; and the development of the same practice by which a composition or definite amount of money or cattle came to be accepted in lieu of further punishment was common in England, as in nearly all countries.[4] The next step was to impose penance on the murderer over and above his liability to pay some composition, and this penance consisted either in self-mortification, or genuflections, and prostrations, and almsgivings.[5]

The practice of the homicide compounding for the death of the victim led to associations of individuals or guilds, which consisted of persons who shared the burdens and benefits of the blood feuds among each other, and which took local shape as a tithing or frankpledge, consisting of ten persons, while a hundred consisted of 100 individuals. The inspection of these tithings, or the view of frankpledge, belonged to each court of the hundred, and a manor usually included one or more of these hundreds. The exaction of some security that each was a member of a tithing, and able to take part in the peace pledge, was carried out strictly by the Danes, who made each tithing responsible for its murders.[6] Under the Saxon laws the gyldsmen in each tithing were not only bound to present their fellows before the court when specially summoned thereto, but they found their own advantage in exercising a kind of police surveillance over them all. If a crime was committed, the gyld were to hold the criminal to his answer; to clear him if they could conscientiously do so by making oath in his favour; to aid in paying his fine if found guilty, and if by flying from justice he admitted his crime, they

[1] 2 O'Curry's Lect. 29. [2] Vened. Code. [3] Dimet. Code, b. ii. c. 8. [4] Anct. Laws of Wales; Anct. Laws of Ireland. [5] Anct. Law of England, Eccles. Inst. [6] Anct. Laws of England, Edgar ii.; Athelstan v.; Hen. I. vii.; Cnut, Sec. 20.

were to purge themselves on oath from all guilty knowledge of the act and all participation in his flight, failing which they were themselves to suffer mulct in proportion to his offence. On the other hand, they were to receive at least a portion of the compensation for his death, or of such other sums as passed from hand to hand during the progress of an Anglo-Saxon suit.[1] At a later stage the relatives took the place of the gyld, and paid the wehrgyld of the slain.[2] And similar rules prevailed in ancient Ireland.[3] Though all men were ordered to attach themselves to a hundred or tithing, so as to entitle themselves to such composition and to the ordeal;[4] and in the time of Edward I. murder being a secret killing of a person unknown, the hundred was fined for it;[5] yet these gilds, or bandships, formed by the English as a mutual support in all quarrels, robberies, and murders, were suppressed by a statute of 1377.[6] But the majority of the towns in England are said to have obtained exemption from the murder fine sometime near the reign of Richard I., and most had obtained it in the reign of John. The city of London had obtained the exemption by a charter of Henry I.[7]

Confiscation of thing causing death—Deodands.—Some of the ancients were not satisfied with classing the unfortunate persons who accidentally caused another's death among murderers, but they extended their condemnation to the inanimate stones, or unreasoning animals, which played any part in the same misfortune. To keep up the sacredness of life, the laws of Moses made it necessary that the ox, if it had gored a man to death, should be stoned to death.[8]

[1] 1 Kemble, Anglo-Sax. 252. [2] 1 Thorpe, 8, 24, 30.
[3] 1 O'Curry, 201 [4] Anct. Laws, Eng. 166. [5] Britt. i. c. 7.
[6] 1 Rich. II. c. 7. [7] 1 Rym. Fœd. p. 11.

[8] Exod. xxi. 28, 29; Gen. ix. 6. The Jews made beasts accountable like moral agents, as to which BOLINGBROKE says he knows nothing more absurd than this, except a custom at Athens, that the weapons by which a murder was committed should be brought into court, as if they, too, were liable to punishment, and the statue which had killed a man by its fall was by a solemn sentence of that wise people, the Thasii, cast into the sea.—7 *Bolingbroke, Works*, 375. SELDEN and others, however, explain these laws as having no object other than inculcating greater respect for human life. In ancient Greece the judges at the Prytaneum passed sentence on the instrument of murder, when the perpetrator was unknown.—*Smith*,

And the laws of King Alfred provided, that, if at their common work one woodman should slay another unwittingly, the tree was to be given to the kindred of the dead man.

The gravity with which the courts in course of time discovered nice distinctions as to the respective culpability of inanimate things is now scarcely intelligible. Britton says, where a man was killed by a fall, the thing which caused the death was adjudged as a deodand to the king. Thus if a man fell from a vessel not at sea, and was killed, the vessel with all that was therein was a deodand; but if the vessel was under sail, the merchandize lying at the bottom was not deemed to be the cause of death, and so was not included in the deodand.[1] If a cart and horse killed a man, it was said to be the thing that moved, that was deemed the deodand.[2] Coke said the king consulted all the judges, and a distinction between a ship in salt and in fresh water was the result.[3] Hale, without searching for any principle in the matter, stated that the instrument of death in misadventure was valued at a sum, because it belonged to the king, who usually gave away the profits in charity. He said, if a man was watering his horse and was drowned, the horse was a deodand; and if a man fell into the water and was carried under the mill-wheel, the wheel was a deodand, but not the mill. And probably for an equally sound reason, if a weight of earth fell on a worker in a mine, the weight of earth only, and not the whole mine, was forfeited. In one case, where a man fell from a cart under the wheel of a waggon as both met, two judges held, that the cart and the waggon, and all the horses and the loading of both carts also were deodands.[4] And where a man in ringing the church bell became caught and hanged, the doubt was raised, but fortunately not settled, whether the bell did not thereby become forfeited.[5]

The mode in which the law of deodands, so obviously

Dict. Ephetæ. And DRACO made a law, that any inanimate thing that caused the death of a human being should be cast out of the country.—*Paus.* 6, 11; *Suid. Nicon.; Plut. Sol.* PLATO, also, in his Laws directs that, if a beast of burden, or animal, cause the death of any one, it is to be slain and cast out beyond the borders; and so if any lifeless object falls on a man and kills him, it is to be cast away beyond the border.—*Plato, De Leg.* b. ix.

[1] Britt. b. i. cc. 2, 8. [2] Year B. 30 & 31 Ed. I. App. 524. [3] 3 Inst. 58. [4] 1 Salk. 220. [5] 1 Lev. 136.

founded in superstition, and so utterly indefensible (as Foster said 100 years ago), on any ground of reason, was reduced to an absurdity and extinguished almost without the aid of any act of parliament, is a notable instance of the power which courts of justice have too seldom exercised, when a law was one from which the common sense of the times revolted. In a case where a waggon and horses suddenly moved, and the driver fell off and was crushed to death by one of the fore wheels, the coroner's jury astutely found, that it was the wheel only which caused the death; and the Court of Queen's Bench held that of course it could not think of interfering with the solemn conclusion of the jury.[1] And the wheel being of small value, it was worth nobody's while to claim the sum put on it. Another jury did the same thing;[2] and this precedent of the wheel became at once a standard authority, and the lords of manors, who coveted these perquisites, ceased soon to push their righteous claims, being disgusted at seeing these so unscrupulously frittered away by the ingenious refinements of their modern judges. The law was, however, not formally abolished till 1846.[3]

Ancient remedy by appeal of murder.—So late as the times of Edward I., if the king did not prosecute a murderer, the relatives might do so, in which case an appeal of murder was brought by the nearest in blood, or his widow, or his foster-child, or even one of his homage; but it was in the option of the defendant, called the appellee, to elect to defend himself by trial of battle, or to be tried by a jury, unless the prosecutor was a woman, or was under the age of fourteen, or above seventy, or in holy orders, or could produce a record to aid his case. A field was arranged, and the spectators were forbidden to stir or cry aloud, so as to disturb the battle, which was fought without armour, with head and hands and feet bare, each

[1] R. v. Rolfe, 2 Barn. 82, 111. [2] Fost. Cr. L. 267.

[3] 9 & 10 Vic. c. 62. BLACKSTONE erroneously attributes the origin of deodands to the blind days of popery, when these perquisites were used as means of expiation for the souls of such as were snatched away by sudden death. But the idea was much older than the pope, as is shown by the Jewish, and Greek, and Gothic legislation on the same subject. The idea may, no doubt, have been adroitly turned to account in the middle ages.

having a staff tipped with horn, and a target of four corners.[1] If the defendant could defend himself until the stars could be seen in the firmament, he could then claim judgment in his favour, and the appellor was committed to prison. If, on the other hand, the defendant was vanquished, he was drawn and hanged, or killed by some painful death, his movable goods were forfeited to the king, and his heirs disinherited. The appeal was in many respects like an action, and could only be brought within a year and day, and the appellor had to find two pledges binding him to prosecute.[2] This mode of prosecuting a murderer, even if the latter succeeded in battle, was not conclusive, for the crown could still prosecute him; in which case, as the crown could not fight, trial would require to be by jury.[3]

The appeal of murder sprung from the blood avenger and the ancient practice of the Germans, of awarding a fine of cattle to the family of the murdered person,[4] just as the ancient Brehon laws also had an eric fine of the same kind,[5] and the ancient Swedes followed the common custom.[6] A statute of Edward I. gave costs to the appellee, if the appellor failed or falsely sued, who also suffered a year's imprisonment besides.[7] Holt, C. J., said this was a noble remedy and a true badge of English liberty. But Treby, C. J., and others, said it was an odious and spiteful prosecution, deserving no encouragement.[8] The last instance of the remedy was in 1818, when the King's Bench was obliged to confess it was still the law of the land, that an appeal of murder might take place after indictment, trial, and acquittal, the party thereby seeking only pecuniary satisfaction, and taking the risk

[1] By Magna Charta a point was gained by settling, that a woman could not appeal for death of any but her husband.—*Mag. Chart.* c. 34.

[2] Britt. b. i. c. 23, 24; Bract. 128–142; Fleta, 41–54.

[3] It was one of the privileges of the citizens of London, conferred by charter, not to be obliged to wage battle.—*Ancient Laws*, p. 217; *Liber Custum.* 248, 252, 259. The same privilege was claimed by the citizens of Lincoln.—*Kelham's Britt.* p. 153. And the burgesses of Bury.—*Cron. Joc. de Brak.* p. 74.

[4] Tac. Germ. c. 21. [5] 4 Bl. Com. 313. [6] 1 Geijer, Hist. 84 (tr. Turner.) [7] 13 Ed. I. c. 12; R. *v* Bambridge, 17 St. Tr. 462. [8] R. *v* Towler, 12 Mod. 372; 1 L. Raym. 373.

of staking his life on the accusation.[1] It was not abolished by statute till 1819.[2]

Murder now triable by indictment.—The complicated laws relating to blood avengers, sanctuaries, murder fines, and deodands, and trial by battle under an appeal of murder, have now all but disappeared, and ended in an ordinary trial of the accused party, when he has an opportunity, by witnesses and advocates, of establishing every kind of explanation or mitigation of his offence, and if possible of proving that he was not guilty at all.

The indictment and trial for murder.—The indictment for murder used formerly to describe with great minuteness the manner in which and the means by which the death was caused, and the exact part of the body attacked, the length, and breadth, and depth of the wound, and of the instrument used in wounding, and even the value of the weapon used. But now the essential parts of an indictment are reduced to the simple facts of time and place, and names of persons, and the allegation that A maliciously murdered B.[3] This being the general allegation, all the details of the crime are merely matters of evidence, which are brought out at the time of the trial. The general rule at common law is, that a trial for murder must take place in the county within which the blow and the death occurred. If the death took place in a different county from that in which the blow was given, then the trial might take place in either county.[4] And of late there are exceptions created by statute to the necessity of trial in the same county.[5] Every indictment should describe the name of the person killed, for certainty should be exacted in all that concerns so serious an accusation; but if the

[1] Ashford v Thornton, 1 B. & Ald. 405. [2] 59 Geo. III. c. 46.

[3] "In any indictment for murder, or for being an accessory thereto, it is not now necessary to set forth the manner in which, or the means by which the death of the deceased was caused, but it shall be sufficient to charge, that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased, and in any indictment against an accessory to the murder, it shall be sufficient to charge the principal with the murder, and then to charge the defendant as an accessory in the usual manner."—24 & 25 Vic. c. 100, § 6. [4] 7 Geo. IV. c. 64, § 12.

[5] By 2 & 3 Ed. VI. c. 24, § 2, (repealed), the trial was to be in the county where the death happened.

name is unknown, it is enough that he be described as "a person whose name is to the jurors unknown." And this kind of objection, though once treated with great favour, is no longer encouraged, for liberal powers of amendment may under the statutes be exercised by the judge.[1]

If an indictment for murder be laid before the grand jury, and they think it is a case of manslaughter only, the course is to present a separate bill, charging manslaughter only.[2] If there be an indictment for murder or manslaughter, and a coroner's inquisition for manslaughter or murder against the same person at the same sessions of gaol delivery, the practice is to arraign and try the prisoner on both, in order to avoid the plea of *autrefois acquit* or *convict*, and to endorse his acquittal or conviction upon both presentments.[3] Whenever a man has been acquitted generally upon an indictment for murder, he may plead *autrefois acquit* to an indictment for manslaughter of the same person, and *vice versâ*, for if the facts are the same the inquiry and verdict are conclusive.[4] And for the same reason a conviction on one indictment may be pleaded as *autrefois convict* to a second for the same facts.[5] Where a defendant is indicted for murder, the jury may think, that, owing to the want of evidence of malice, the offence amounts only to manslaughter, in which case they may find the defendant guilty of manslaughter.[6] And if two are indicted for murder, one may be acquitted and the other may be found guilty of aiding and abetting.[7] If two are indicted, each for the murder, and each as an aider and abettor alternatively, the jury may find both guilty generally, if uncertain which of them acted as principal.[8] In some cases there may be no alternative between convicting for murder and finding a verdict of acquittal according as certain evidence is or is not worthy of credit.[9] And it is not competent for a person charged with murder to be found guilty of assault only.[10] But the jury may find the

[1] 14 & 15 Vic. c. 100, § 1; R. v Welton, 9 Cox. C. C. 297. [2] R. v Bubb, 4 Cox, C. C. 455. [3] 1 East, P. C. c. 5, § 134; R. v Smith, 8 C. & P. 160. [4] R. v Holcroft, 4 Co. 46 b; 2 Hale, 246. [5] R. v Wigges, 4 Co. 45; 2 Hale, 246, 252; Fost. 329. [6] 2 Hawk. c. 47, § 5. [7] R. v Taylor, Leach, 360. [8] R. v Downing, Den. C. 52. [9] R. v Smith, Russ. Cr. 749. [10] 14 & 15 Vic. c. 100, § 10.

prisoner guilty of the lesser offences of manslaughter, or excusable homicide, or of an attempt to commit murder.[1] If the facts show excusable homicide, a verdict of acquittal is entered.

The sentence on murderers.—Every person now convicted of murder shall suffer death as a felon.[2] And the judge is imperatively required to pronounce such sentence on the conviction.[3] The mode in which the sentence is carried out is by hanging, and though formerly this was done in public by way of making the example memorable, it was found that the occasion was perverted into a spectacle too demoralising for any possible good to be gathered from mere publicity. And in 1867 it was at last enacted, that judgment of death should be executed within the walls of a prison, in presence of the sheriff and a few officials only.[4] The usual rule is, that the officer having the custody of the criminal is bound to execute him. In case of doubt, the Queen's Bench Division has jurisdiction to direct which of several ministerial officers shall carry out the sentence.[5] The body of every person executed for murder is now to be buried within the precincts of the prison in which he shall have been last confined.[6]

Suicide, how far included in murder.—Murder, as already seen, is the killing of one human being by another, and it is natural and inevitable that all laws should have something important to prescribe for this situation; for unless each individual is protected as well as laws can protect him against all interference, pain, injury, or death at the hands of others, life and all its pursuits would be a constant

[1] 1 Hale, 449; 2 Hale, 302; Co. Lit. 282a. [2] 24 & 25 Vic. c. 100, § 1. [3] Ibid. § 2.

[4] 31 & 32 Vic. c. 24, § 23. According to Britton, if a prisoner was found guilty of murder he was sentenced to death, and he forfeited his movable goods to the crown, and a year's use of the inheritance, and the heirs were incapable of succeeding to the estate, and the widow had no dower.—*Britt.* i 6, 3. The consequences of sentence of death on the property of the prisoner belong to the subject of "Security of Property."

[5] R. *v* Garside, 2 A. & E. 266; 4 N. & M. 333; R. *v* Antrobus, 2 A. & E. 788.

[6] 24 & 25 Vic. c. 100, § 3. Before burial the body used to be hung in chains near the place of the crime. As to this, see *post*, Ch. viii. "Punishment."

struggle and warfare. But a new idea altogether arises when one reflects that each individual, being also the master of his own life, can do acts which injure, wound, and kill his own body as well as the bodies of others. This is a later problem, which is developed only after some power of reflection and sense of refinement have come over society. Savages are all but incapable of conceiving the very notion of destroying their own lives; suicide is too intricate and abstract a speculation to disquiet them;[1] and when they begin at last to see a difficulty, they are much at a loss what to do or what to prescribe in a matter which seems to be so much beyond all the laws and commandments of man. What punishment indeed is possible, seeing that the person to be punished is already beyond the reach of punishment; and if he is not to be punished, who then is the person to be punished in his place—to what extent, and under what circumstances and conditions, can this be justly done? These are difficulties which no legislature has been able to overcome, except after long experience and reflection.

It is the necessary effect of good laws to create a general sense of security, which, like the atmosphere each member of society breathes and lives upon, dilates his faculties and enjoyments without almost the trouble of thinking. And the more highly the lives of others are valued, one's own life, as a separable possession, is insensibly raised in value by a species of reflection and mutual reaction. Nevertheless it is easy to see, that no human laws can possibly do much to restrain suicide. If all that the law can do for the individual is so little attractive, that he has already made up his mind that life is not worth having, there is scarcely anything that the law can say further on the subject. It is obviously only by moral and religious considerations that the dignity of life can be maintained, vindicated, and enhanced, and no tests that the law can supply have more than an insignificant effect on the view taken of his own life by each human mind. Hence the perplexity and confessed inability of any municipal law to confront and overpower a tendency which can so easily elude it, and can so seldom be baffled. There is no binding one over to keep the peace against himself. As Beccaria observed, suicide is a crime which seems not to admit of punishment, properly speaking,

[1] 2 Grey's Australia, 248.

for it cannot be inflicted but on the innocent or upon an insensible dead body. It is idle to scourge a statue. Mankind love life too well to admit of suicide being common from its unavoidable impunity.[1]

Perplexity of the ancients as to suicide.—The ancients were not unanimous in the view they took of the lawfulness of suicide. Plato thought it justifiable when one was overwhelmed by calamity or poverty.[2] Aristotle condemned it as an injury to the state.[3] The Gymnosophists, on reaching a certain age, or when threatened with disease, burnt themselves, after inviting their friends to a feast.[4] Cicero asserted the doctrine of Pythagoras, that it was unworthy to abandon one's post and leave life, without the order of Providence, yet praised the suicide of Cato, who resolved to die rather than look on the face of a tyrant.[5] Virgil, Cæsar, Ovid, Seneca, Plotinus and Porphyry seemed to think suicide a shrinking from duty. But there was considerable vagueness in the view held. The Stoics generally viewed suicide as one of the ways of displaying their indifference to life and its troubles. The Stoical type of moral excellence, which was that aimed at by the educated classes of Rome, taught that death was not to be feared, and that rewards or punishments in the present or future life were not the true motives of virtue. Whatever views in the abstract may have been held, many distinguished ancients committed suicide.[6] But no writer on this subject has

[1] Beccaria, c. 32. A great writer has said, that though there are many crimes of a deeper dye than suicide, there is no other by which men appear so formally to renounce the protection of God.—*Mad. de Staël, Reflex. sur le Suicide.* St. Cyran, one of the founders of the Port Royal, in 1608, wrote a treatise, vindicating the right of a man to kill himself for the good of his prince, of his country, or of his parents. —*Volt. Becc*, c. 19.

[2] Laws, lib. ix. [3] Ethics, v.

[4] Q. Curt. b. viii. c. 9. The learned have remarked that there is nothing expressly stated in the law of Moses as to suicide, and that it has not generally been deemed to be included in the prohibitions of the sixth commandment.—*Michaelis, Com.* § 272. But if the learned have so settled this point, it only shows the absurdity of interpreting divine laws in the way that courts of law would interpret most municipal laws; for the subject matter, the object and effect of the two kinds of laws differ *toto cœlo.*—See *ante*, p. 113.

[5] De Senect. c. 20; Tuscul. i.; De Offic. b. i. c. 31.

[6] One Hegesius, mentioned by Cicero, was called the orator of death, from the persuasive manner in which he painted this final

surpassed Marcus Antoninus, who says, "it becomes a man of wisdom neither to be inconsiderate, impetuous, or ostentatiously contemptuous about death, but to await the season of it as of one of the operations of nature."[1]

Influence of Christianity on views of suicide.—While suicide was in many instances applauded, and in a few instances faintly reproved in the civilisations of Greece and Rome, most of the barbarous tribes from Denmark to Spain also habitually followed the practice, until the influence of Christianity gradually superseded this pagan view, and vindicated the sacredness of life.[2] And it has been said that, under the empire of Catholicism, seconded as it was in this respect by Mohammedanism, suicide during many centuries almost absolutely ceased in all the civilised, active, and progressive part of mankind.[3]

relief from care, and many voluntarily rushed to the tomb with enthusiasm.—*Tusc. Quaes.* lib. i.; 2 *Lecky, Hist. Mor.* Cocceius Nerva, a prosperous lawyer, is said to have committed suicide owing to the sad state of public affairs in the republic.—*Tac. Ann.* b. vi. c. 29.

[1] M. Anton. b. ix. c. 3. The ancients record with what indifference the Indians of their time ascended a funeral pile and burnt themselves to death, it being, as they represented, an eastern custom. Calanus did so in presence of the whole army of Alexander the Great. And a venerable Brahmin in an embassy from Porus to Augustus did the same thing at Athens.—2 *Maurice, Ind. Ant.* 107. The Siamese, indeed, considered it a laudable act of piety.—3 *Univ. Mod. Hist.* 336. In India, so eager were men to join in drawing the car of Juggernaut, and so confident if they could only pull a rope, they would go to heaven, that in their excitement they fell beneath the wheels, not unwillingly.—*Clarke, Ten Relig.* 134.

The code of Ayeen Akberry enumerated five modes of meritorious suicide. These were starvation—burying oneself in snow—abandoning oneself to alligators in the Ganges—cutting one's throat at Allahabad—and covering oneself with cow-dung and setting fire to the heap.—2 *Maurice, Ind. Ant.* 47. It has been said that in China, at one time, a man would kill himself on the doorstep of one who had affronted him as a mode of vengeance.—*Clarke, Ten Relig.* 22.

[2] 2 Lecky, Hist. Mor. 56.

[3] After the Reformation many unfortunate women accused of witchcraft resorted to suicide to avoid the malignant persecutions which dogged them.—2 *Lecky, Hist. Mor.* 38. Epidemics of suicide have also occurred in the middle ages.—*Hecker, Epid. Mid. Ages*, 121. Montaigne says there was at one time kept at Marseilles a

Capital punishment by way of suicide.—Suicide has been in some countries the form in which capital punishment has been carried out, though it is a cruel and barbarous form. Socrates, when condemned for blasphemy, was sentenced to drink poison.[1]

Gladiatorial contests a kind of suicide.—Another species of compulsory suicide was that of the gladiatorial games at Rome. These were, it is supposed, originated to supply the practice of human sacrifices to appease the *manes* of the dead, and were defended in later times as a means of sustaining the military spirit by the constant spectacle of courageous death,[2] and continued for centuries almost without a protest.[3]

The Fathers took up high ground on the subject of these brutal pastimes, and denounced them with unsparing

poison prepared out of hemlock at the public charge, for the use of those who wished to commit suicide, first giving an account to the senate of six hundred, of the reasons for committing the act.—*Montaigne*, b. ii. c. 3.

[1] In Japan, when an official had violated the law, he was allowed and encouraged to rip up his own body, and make an end of himself. By this act he saved his property from forfeiture, and his family from death along with him.—1 *Perry's Japan*, 17.

The ancient Ethiopians also made their malefactors commit suicide. —*Diod. Sic.*; *Strabo.* They had also a singular law, that their king should despatch himself whenever he received a message from the priests, that the gods required it for the good of the country.—*Diod. Sic.*

[2] Cic. Tusc. lib. ii.; Lecky, Hist. Mor.

[3] Human sacrifices were not finally abolished, near Rome, till the time of Gratian.—*Lact. Inst.* b. i. c. 21. The gladiatorial duels began B.C. 264.—*Valer. Max.* ii. 4, § 7. There were amphitheatres erected in all the large towns, and the Colosseum held no less than 80,000 spectators. Agrippa built a magnificent theatre at Berytus, where, on one occasion, 14,000 condemned criminals were ordered to fight, and they fought so well that not one survived.—*Joseph. Ant.* b. xix. c. 7. Julius Cæsar once amused the people with 320 couples. —*Dion Cass.* b. lxviii. Augustus, however, ordered that not more than 120 men should fight on a single occasion, and that no prætor should give more than two spectacles in a single year.—*Dion Cass.* b. xlviii. The influence of these bloody encounters pervaded the whole round of Roman life.—*Epict. Ench.* 32, § 2; *Arrian*, iii. 15; 2 *Lecky*, *Hist. Mor.* Philosophers like Seneca, Plutarch, and Marcus Antoninus, condemned these demoralising and brutal scenes, though Cicero held that, when the gladiators were guilty men, no better discipline against suffering and death can be presented to the eye.—*Tusc. Q.* ii. 17.

vigour as nothing less than murders; and they were finally suppressed in the fifth century.[1]

Suicide how far a crime at common law.—It seems to have been a doctrine of our common law at an early date, that murder included suicide, and that the latter act was *ipso facto* a felony.[2] Hence forfeiture of goods and chattels was a legal consequence of the act, and as the suicide was his own executioner, the forfeiture accrued on the act, since conviction was rendered impossible. But though trial was superseded, an inquisition by the coroner was held on the body. And yet this doctrine, that murder included suicide, tends to inconsistencies, and cannot be logically acted on.[3] It is self-evident, however, that life is not a species of property, and that the law could never vindicate suicide on the plea, that one is thereby only destroying at pleasure what is one's own. It is in every view a wrongful act, or at least one without legal excuse. Hence when one person asks another to kill him, the law views it as nothing less than a murder, for one had no right to give such a command, and the other ought to have known the same, and ought not to have acted upon it. In such an event he that is killed is deemed no suicide, but the killer is deemed a murderer.[4]

Again, two persons sometimes agree to kill each other, and one may in the result be killed and the other not. In this event it may become necessary to ascertain in what position they stand, for it may often be difficult to decide

[1] It was not till A.D. 365, immediately after the convocation of the Council of Nice, that the first Christian emperor issued the first edict in the Roman empire condemnatory of the gladiatorial games.—*Cod. Theod.* lib. xv. tit. 12, lex 1; 2 *Leck. Hist Mor.* 37. Their suppression was not effected in the metropolis of the empire till nearly ninety years after Christianity had been the state religion.—2 *Leck. Hist. Mor.* 39. The last gladiatorial show was celebrated at Rome under Honorius, A.D. 404, in honour of the triumph of Stilicho, when an Asiatic monk named Telemachus rushed into the amphitheatre and attempted to part the combatants. He perished beneath a shower of stones flung by the angry spectators, but his death led to the final abolition of the games.—*Theodoret.* v. 26. Combats of men with wild beasts continued much later, but were finally condemned at the end of the seventh century by the Council of Trullo.—3 *Milman, Hist. of Early Ch.* 343; 2 *Lecky, Hist. Mor.* 40.

[2] 1 Hale, P. C. 412.

[3] R. *v* Burgess, 1 L. & C. 258.

[4] 1 Hawk. P. C. c. 27, § 6; R. *v* Russell, Ry. & M. 356.

whether one who is killed under such circumstances commits suicide, or is murdered by his confederate. This question will mainly turn on whether the person killed by his own order and contrivance contributed in a material degree to his own death, or whether the material part was contributed by his partner.[1] Each is considered the murderer of the other, and if the purpose is only partly executed, this is the footing on which the mutual guilt is judged.[2]

Ancient punishment of suicide.—Plato, though recognising some palliations for suicide, directed that he, who commits suicide from indolence or cowardice, shall be buried ingloriously, and laid alone in an uncultivated place, with no column or name to mark where he lies.[3] And Solon, though denying burial to the body, ordered the hand to be cut off and buried by itself.[4] The Roman law did not in any way visit the consequences of suicide on the property or person of the dead. But Domitian ordained, that if an accused person committed suicide, he should be deemed to be condemned.[5]

An able writer says, that the old pagan legislation on suicide remained unaltered in the Theodosian and Justinian codes, but a Council of Arles in the fifth century having pronounced suicide to be the effect of diabolical inspiration, a Council of Bragnes in the following century ordained that no religious rites should be celebrated at the tomb of the culprit, and that no masses should be said for his soul; and these provisions, which were repeated by later councils, were gradually introduced into the laws of the barbarians and of Charlemagne. St. Lewis originated the custom of confiscating the property of the dead man, and the corpse was soon subjected to gross and various outrages. In

[1] 1 Hawk. P. C. c. 27, § 6; Keilw. 136; Moor, 754. [2] R. *v* Alison, 8 C. & P. 418; R. *v* Dyson, R. & Ry. 523. [3] Plat. De Leg. b. ix. [4] Æsch. Ctes. 636.

[5] Gibbon, Decl. and F. c. 44. Josephus says that, in some nations the right hand of the suicide was amputated, and that in Judæa the suicide was only buried after sunset.—*De Bell. Jud.* iii. 8. In Japan also the suicide was buried like a dog, and those who attempted to commit the crime were exposed three days to disgrace, and then made beggars.—*Dickson's Japan*, 339. The Indians of Southern America refused mourning for a suicide, and buried the dead body like that of a coward.—*Jones, S. Ind. Ant.* 113.

some countries it could only be removed from the house through a perforation specially made for the occasion in the wall; it was dragged upon a hurdle through the streets, hung up with the head downwards, and at last thrown into the public sewer, or burnt, or buried in the sand below high-water mark, or transfixed by a stake on the public highway.[1]

Punishment of suicide in England.—The mode of interment of a suicide in England used for a long time to be according to the rubric, that is to say, without the burial service being read over the grave. And it is said he was buried in a public cross-road, with a stake driven through his body.[2] This burial was in 1824 directed to be discontinued, and instead, the *felo de se* is to be buried in the parish churchyard privately, between the hours of nine and twelve at night.[3]

Hale seemed to justify the posthumous punishment of suicide by saying, that it was a sin against God, and the sovereign had an interest in the life. And Blackstone, in the same vein, said, the law of England was wise and religious, and such a crime was an invasion of the prerogative of the Almighty. Though the studied degradation to the senseless body was repealed in 1824, the forfeiture of the suicide's personal estate continued to be the law till it was repealed in 1870.[4] There is now, therefore, no longer the strong motive which formerly impelled the juries to find that the suicide was committed while the person was of unsound mind, for nothing now turns on that charitable perjury, unless, indeed, by reason of some contract between the parties it has been otherwise agreed.[5]

[1] 2 Lecky, Hist. Mor. 53. The early Church punished with excommunication all who laid violent hands on themselves, who were known by the common name of self-murderers. Such persons were denied a Christian burial and the benefit of all memorial in the Church's prayers after death.—*Bing. Chr. Antiq.* b. xvi. c. 10.

[2] 4 Bl. Com. 190. Sir J. Mackintosh said, there was no authority in the books except Blackstone's for this treatment of the body.—9 *Parl. Deb.* (2nd.) 414. It is mentioned, in 17 St. Tr. 56, that the stake was driven through the suicide's body.

[3] 4 Geo. IV. c. 52.

[4] 33 & 34 Vic. c. 23, § 1.

[5] Mackintosh observed, that the barbarity of punishing the relatives of a suicide was enhanced when there was neither trial nor defence.

Other legal consequences of suicide.—Whatever other consequences flow from the fact of suicide, they flow now, not from the common or statute law, but merely from some collateral contract. In contracts for life insurance and similar contracts which rest on the basis of the natural desire of life, it is obvious that any capricious destruction of life by the party assured will be a violation of the bargain, and will discharge the opposite party, who engaged to pay certain moneys only in the event of natural or accidental death, under neither of which categories will suicide come. There is no hardship or injustice therefore now resulting to the friends or relatives of a suicide, other than such as result from the breach of some contract which the deceased had engaged, but has failed, to observe. Such cases occur most frequently in reference to insurances of life. When an insured person commits suicide, the rule is, that if the act is done in a state of insanity, the life assurance is not void,[1] unless an express condition to that effect is inserted in the policy, which is often the case.[2]

Discovery of murderer and function of coroner.—The law of murder is not complete, unless in addition to the ordinary modes of punishing the crime, the case be also contemplated of the murderer being unknown. It would be a singular omission, if any municipal law failed to give some assistance in cases where a murder has obviously been perpetrated, but owing to its secrecy, no trace of the criminal is extant, and thereby all the benefit of the elaborate machinery, matured by centuries of experience, for executing justice has become lost in any one instance. Much of the efficacy of modes of punishment depends on the certainty with which they can be brought to bear. But when a crime of this kind is committed, it is, according to the theory of the law, the interest and duty of each and all to give some help towards vindicating its infraction. In this country the prosecution of crime is left to the natural revenge, or, as some would call it, the natural resentment, of those individuals

[9] *Parl. Deb.* (2nd) 416. He also told the House of Commons such punishment was an act of malignant and brutal folly, useless to the dead, torture to the living.—*Ibid.* 414.

[1] Horn *v* Anglo-Australian Co., 30 L. J. Ch. 511; Solicitors Co. *v* Lamb, 2 De G. J. & S. 251. [2] White *v* British Empire Co. L. R. 7 Eq. 394.

who feel the loss most keenly, and who, on that account, are relied upon to bear the burden of working out and seeing applied the appropriate punishment. This is a singular anomaly, and reflects little credit on those who affect to see an importance in separating criminal from civil remedies. The ground put forward for this distinction has always been, that the one is pursued in the interest and on behalf of the public at large, and the other for the sole benefit of the individual, and yet notwithstanding so plausible a theory, there has as yet been no attempt to carry it out logically. Any individual may prosecute an offender, but he does it at his own expense and risk, subject to this, that in the more grievous cases some of his expenditure is refunded out of a common purse, and even this last qualification is of comparatively modern origin. As this lamentable defect leads to many crimes going unpunished, it was all but inevitable that somehow assistance should be given in tracking out unknown murderers. Owing to rules which will afterwards be stated, the machinery of prosecution for crime cannot be put in motion at all, until some definite person is fixed on, against whom the crime can be charged. If no such individual is forthcoming, justice stands still. But fortunately, while the want of a public prosecutor has existed up to the present time, some of the shortcoming has been supplied by the services of a coroner, whose business it is to find out in cases of sudden and unnatural death, who is the person, if any, that is to blame. To help in this inquiry, he is allowed to call to his aid jurors and witnesses, and the beginning and end of his function is to fix on some definite individual or individuals against whom this charge of crime can be made, and so the appropriate punishment invoked and put in motion. Other than this, he has no clear object or place in the machinery of the law; and when a better and safer method of eking out a defective criminal procedure, and of finding out who, if any, is the criminal to be charged with murder or manslaughter, is discovered, then, and not before, he may cease to be. So long as a coroner exists, a description of his functions and procedure requires to be noticed at this stage, for these are at present a necessary part of the law of murder, and part of the security of the person.

The coroner was an officer of the crown, who is noticed

at the time of King Alfred, Henry II., Richard I., and also in Magna Charta.[1] Before Magna Charta he used to hold pleas of the crown, and try offenders; but his authority was by that statute restricted chiefly to an inquiry into violent and untimely deaths. The Lord Chief Justice of the Queen's Bench Division was by virtue of his office supreme coroner over all England, and the other judges of that court were also sovereign coroners; and each of them may still act if he pleases.[2] There are also a few places in England where coroners are appointed by charter or immemorial usage in a manner different from the rest of the kingdom. A grant of the crown is in some cases presumed as the origin of such a right;[3] and the statute 28 Edward III., c. 6, which confirmed to each county the power of electing its coroner recognised these exemptions.[4] The Lord High Admiral also appoints coroners, having jurisdiction for the high seas, and a concurrent jurisdiction with the county coroners over the shore and mouths of rivers up to the first bridge.[5] When the tide is in, the admiralty coroner has jurisdiction up to high water mark, and when the tide is out the county coroner has jurisdiction down to low water mark.[6] The

[1] Bac. on Gov. 66; Dugd. Mon. 171; 2 Inst. 30; 4 Inst. 271; Wilkins, Leg. Angl.-Sax. 337; Umfrev. Lex Cor. xx.; Spelm. Vicecom.; Mirr. c. 1, § 3; Lamb. Eiren.; Magna Chart. c. 24.

[2] 4 Inst. 73; 4 Rep. 57b.

[3] Co. Litt. 114a; 2 Hawk. c. 9, § 11; 9 Rep. 29b.

[4] See also 7 & 8 Vic. c. 92, § 29; 23 & 24 Vic. c. 116, § 9. The Lord Mayor of London is, by charter, coroner of London, and in the Cinque Ports, the Chapter of Westminster, the Isle of Ely, and the Stannaries of Cornwall, there are coroners appointed in an exceptional manner.—2 *Hale, P. C.* 53. In the circuit of twelve miles round the residence of the king's courts a coroner of the Verge used to be appointed by the king's letter patent, and latterly by the stewards of the household, though the county coroner had also a concurrent jurisdiction given to him by a statute of Edward I.—5 Ed. II. c. 27; 13 Rich. II. c. 3; 4 Rep. 46b.; Britt. c. 1, § 6; 2 Inst. 550: 2 Hale, P. C. 54; 28 Ed. I. c. 3; 33 Hen. VIII. c. 12. It was held, however, in interpreting this last statute that both the coroner of the verge and the coroner of the county must sit together, neither having jurisdiction without the other.—*Hamlin's Case*, 2 *Leon.* 160; 4 *Rep.* 45b, 46b; 2 *Inst.* 550; 2 *Hale, P. C.* 55; 3 *Inst.* 134. But within the precincts of the palace the coroner of the queen's household alone can hold the inquisition.—33 Hen. VIII. c. 12. § 3.

[5] 15 Rich. II. c. 3; 2 Hale, P. C. 54, 55.

[6] 3 Inst. 113; 5 Rep. 107.

county coroner had also at common law jurisdiction in arms of the sea lying within the body of the county so situated, that one shore can be seen from the other.[1] But a statute also conferred jurisdiction on the admiralty coroner, when death occurs in great ships in the main stream.[2] In these cases of concurrent jurisdiction, the coroner, who first begins the inquiry, absorbs the entire jurisdiction in such matter. And wherever the body is found, the jurisdiction attaches, though the blow or wound may have been given out of the particular jurisdiction.[3]

By whom coroners are appointed or elected.—The coroners for the county were directed by the Statute of Westminster first to be chosen by the freeholders, and usage, controlled by the Lord Chancellor, regulates the number appointed.[4] And detached parts of counties are now deemed for the purposes of coroners to be part of the counties with which they have the longest common boundary.[5] In boroughs which have a separate court of quarter sessions, the town council may always appoint a fit person, not being an alderman or councillor, to act as coroner of the borough.[6] A coroner for the county is elected by the freeholders on a petition by them to that effect, for which purpose, on the death, or removal, or ouster of a coroner, a writ is issued to the sheriff, called a writ *de coronatore eligendo*, under which he appoints the time and place of election, and this writ cannot be stayed except on the ground of fraud in obtaining it.[7] And a county has been authorised to be divided into districts, so that each coroner may confine his duties

[1] 2 Hale, P. C. 15, 54; 2 Str. 1097; 4 Inst. 140; And. 231.
[2] 15 Rich. II. c. 3. [3] 24 & 25 Vic. c. 100, § 10.
[4] 3 Ed. I., c. 10; 2 Inst. 175; 2 Hale, P. C. 55. Local statutes governed to some extent until recently the county of Chester.—3. Vic. c. 87 (loc.); 7 & 8 Vic. c. 92; 23 & 24 Vic. c. 116, § 7. And the county of Durham.—6 & 7 Wil. IV. c. 19; 1 Vic. c. 64. And in Wales two coroners are appointed for each county.—33 Hen. VIII. c. 13; 34 & 35 Hen. VIII. c. 26.
[5] 6 Vic. c. 12, § 2; 7 & 8 Vic. c. 92, § 23.
[6] His expenses are paid out of the borough fund, and he must render full accounts.—1 Vict. c. 68, § 3. He is substantially paid by fees.—5 & 6 Wil. IV. c. 76, § 62; R. v Grimshaw, 10 Q. B. 747.
[7] Re Coroners of Salop, 1 Mac. & G. 377; Re Hemel Hampstead, 5 De G., M. & G. 228.

to one of the districts and be elected by the freeholders within such district.[1]

At first only knights were chosen to the office of coroner, but a statute of Edward III. defined the qualification to be one "of the most meet and lawful people." [2] A statute of the same reign enacted, that the person chosen should have land in fee within the county, it being considered that he should have some material guarantee to answer any fines that might be imposed upon him.[3] This reason is, however, vague and indeterminate. The mode of proceeding at the election is now set forth in recent statutes.[4] The polling is to continue for one day only.[5] The electors described by the statute of 28 Edward III. c. 6, have long been construed to denote the whole freeholders, as those only were the suitors at the old county courts.[6] All persons, therefore, who have a freehold interest in lands within the district or county are entitled to vote.[7] If required by a candidate, each voter may be called on to take an oath before voting that the freehold has not been granted to him colourably, in order merely to qualify him to vote, and any falsehood in this respect is a legal perjury.[8] Should any dispute arise as to the correctness of the voting, as a scrutiny is incident to all elections by vote, the sheriff is bound on proper suggestion to grant such scrutiny, otherwise he is liable to an action by the person entitled.[9] When the candidate is declared duly elected, he takes the oath in open court before the sheriff; [10] and the sheriff thereafter makes his return to the Court of

[1] 7 & 8 Vic. c. 92; 23 & 24 Vic. c. 116, § 7; R. v Lechmere 16 Q. B. 284; Ex p. Payne, 6 L. T., N. S. 536. [2] 3 Ed. I. c. 10; 28 Ed. III. c. 6; 4 Inst. 271; 2 Hawk. P. C. c. 9, § 3. [3] 14 Ed. III. St. 1, c. 8; Fitz. N. B. 163; 1 Bl. Com. 347. [4] 7 & 8 Vic. c. 92; 23 & 24 Vic. c. 116. [5] Ibid. § 2. [6] 2 Hawk. P. C. c. 9, § 10; 2 Stubbs, C. H. 227.

[7] A statute, 58 Geo. III. c. 95, repealed by 7 & 8 Vic. 92, expressly included equitable interests, but this enactment seemed unnecessary.

[8] 7 & 8 Vic. c. 92, §§ 13, 14.

[9] Starling v Turner, 2 Lev. 50. The candidates have to bear equally the sheriff's reasonable charges and expenses.—7 & 8 Vic. c. 92, § 16.

[10] The writ directs this; F. N. B. 163; 31 & 32 Vic. c. 72; 34 & 35 Vic. c. 48.

Chancery, certifying the name of the new coroner, and if he fail to do so he is liable to an action.[1]

Authority and duty of coroner.—In the time of Edward I. the coroner was to inquire into the lands and goods of the guilty person, and into the cases of rape, and wounding or maiming as well as the length, breadth, and deepness of the wounds; the breaking of houses, the finding of treasure, the finding of wreck and its value, and the horses, boats, and carts whereby people were slain.[2] But many of these minor functions have disappeared under the progress of new arrangements in legal duties.[3] He is, however, by virtue of his office, a justice of the peace, for some purposes; such as causing persons guilty or suspected of guilt to be apprehended.[4] And he may bind to the peace any person who makes an affray in his presence.[5] Magna Charta took away from him the power of holding pleas of the crown.[6] And the general duties of his office were defined by the statute of 4 Edward I. st. 2, *de officio coronatoris.* This statute (qualified by 1 Richard III. c. 3) directs that he shall go to any place where a person is slain or suddenly dead, and inquire into the circumstances—who were present—and who, if any, were culpable. This duty of the coroner is to be exercised with great discretion. Where a person dies suddenly in a house, and there is no reasonable suggestion that the death was otherwise than in the course of nature, this is no ground for the coroner's interference, unless he is requested by the occupier of the house or person having some authority in the matter. The correct course is for those who suggest foul play or violence or unnatural causes, to inform the constable of the district who will give notice to the coroner.[7] A coroner has sometimes been blamed by the court, and has incurred censure for too hastily obtruding himself into private families to institute his inquiries.[8] The practice of paying

[1] 2 Vent. 26; Fitz. N. B. 163. [2] 4 Ed. I. Stat. Cor.

[3] He cannot inquire into the cause of fires.—R. *v* Hertford, 29 L. J., Q. B. 249. He has power to act in aid of the sheriff in some cases.—5 M. & S. 144; 8 Mod. 193; 1 W. Bl. 506; 7 & 8 Vic. c. 92, § 22.

[4] Mirr. c. i. § 13; Lamb. Eiren. 378; 2 Hale, P. C. 107. [5] 1 Bac. Abr. 491 [6] Mag. Chart. c. 17. [7] 1 Salk. 377; 1 East. P. C. 378, 382.

[8] 11 East, 229; 10 Q. B. 796. Where fatal accidents occur in mines

coroners by fees necessarily tended to this evil.[1] When several coroners acted for one district, the first who held the inquiry was deemed seised of the whole jurisdiction.[2] But now each has a district of his own, though a neighbouring coroner may act for another who is unable to attend.[3] As it is the duty of the coroner to hold an inquest on the body of any person who has died a violent death, it is deemed essential that the body should be seen when it is fresh. Hence, if any person bury the body either before the coroner has been informed, and had an opportunity of viewing it, or allow too great time to elapse before the coroner has been informed, this is an indictable offence.[4]

The body of the dead person is viewed by the coroner and the jurors, because it tends to throw light on all that contributed to the cause of death. He ought, therefore, to cause a jury, consisting of at least twelve persons, to be summoned.[5] Any undue delay or refusal is now punishable by attachment on the application of the Attorney-General to the Queen's Bench Division,[6] or by removal by the Lord Chancellor.[7] Wherever the body is found, the coroner of the district has the jurisdiction to hold the inquest, though the causes of death may have occurred elsewhere.[8] And if the inquest is not taken upon the view of the body itself, that is to say, when the body is either present or within access of the jury, the inquest is void.[9] It is not, however, essential that both the coroner and jury should view the body at one and the same time, or that the latter be sworn in view of the body, though that is the correct course.[10] Indeed, the body itself is deemed part of the evidence before the jury, and according to the ancient practice was deemed to be lying in view during the whole inquiry,[11] the reason for this being, that the body supplies

special enactments provide that due publicity, and the presence of all interested shall be secured.—35 & 36 Vic. 76, § 50; Ibid. c. 77, § 22. And the same as to railway accidents.—36 & 37 Vic. c. 76, § 5. And deaths in prison.—28 & 29 Vic. c. 126, § 48.

[1] I East. P. C. 382. [2] 2 Hale, P. C. 56, 59. [3] 7 & 8 Vic. c. 92, § 20. [4] R. v Clark, 1 Salk. 377; Anon. 7 Mod. 10; 2 Hawk. P. C. c. 9, § 23. [5] 2 Hawk. P. C. c. 9 §, 22. [6] 23 & 24 Vic. c. 116, § 5. [7] Re Ward, 4 L. T., N.S. 458. [8] 6 Vic. c. 12, § 1; R. v Hinde, 5 Q. B. 944. [9] R. v Ferrand, 3 B. & Ald. 260. [10] 6 & 7 Vic. c. 83, § 2; R. v Ingham, 5 B. & S. 257. [11] 4 Ed. I. st. 2.

important evidence, and that evidence may be rendered futile by long delay. The coroner, when holding his inquiry, should confine this to the antecedents of the death, and though he may inquire into any alleged accessories to the crime, the question whether anyone was an accessory after the fact is in general immaterial.[1] In furtherance of his duty he may issue his summons requiring the attendance of a witness, and fine such witness for not attending, or for contempt in not giving evidence.[2] And as an inquisition of the coroner is on the footing of an indictment, he is bound to receive evidence on the part of the person accused or suspected.[3] He is also bound to take down the material part of the evidence in writing.[4] He may also bind over all material witnesses to appear and give evidence at the trial of the accused. When the coroner finishes his inquiry, and the verdict of the jury is given, the inquisition is drawn up and sealed by the coroner and jury. After which step the function of the coroner is fully discharged, and no second inquisition can be taken till the first is quashed, which it may be on the ground that it was abortive, and that there is reason to believe better evidence is accessible.[5] Moreover, the Queen's Bench Division may order a new inquiry before special commissioners.[6] Should the verdict be one of guilty, the coroner may issue his warrant to apprehend and commit the prisoner.

As the duties of the coroner are paramount to his duties as a citizen, he was always held exempt from those which were inconsistent with his own;[7] and he is also exempted by statute from some others. He was also, as a matter of course, held to be privileged from arrest for civil debt in going to and returning from holding an inquest.[8] The coroner enjoys his office for life, though it used to be vacated by his being appointed to an inconsistent office, as that of sheriff or verderer, incidents which

[1] 2 Hawk. P. C. c. 9, §§ 26, 27; Mirr. 29 Pl. 95. [2] 7 & 8 Vic. c. 92, § 17; 22 & 23 Vic. c. 21, § 20. [3] 2 Hale, P. C. 60; R. v Ingham, 5 B. & S. 257. [4] 7 Geo. IV. c. 64, § 4. [5] R. v White, 3 E & E. 1860; R. v Carter, 34 L. T., N. S. 849. [6] Anon. 12 Mod. 112. [7] 2 Rol. Ab. 632, § 4. [8] Ex p. Coroner of Middlesex, 6 H. & N. 501.

now can seldom arise.[1] A county coroner had no power originally, though an admiralty coroner was by his appointment so authorised, to appoint a deputy;[2] but that power is now conferred upon him, so that he may appoint in writing during his pleasure a deputy approved by the Lord Chancellor. Such deputy, however, can only act during the illness of the coroner, or his absence from any lawful or reasonable cause;[3] and absence on a holiday is a very reasonable cause.[4] A borough coroner also has a like power to appoint by writing a deputy to act during his illness or unavoidable absence, as, for example, where he is holding another inquest.[5]

Fees and expenses of coroner.—At first the duties of the coroner were so high, that he was not allowed to claim any remuneration.[6] Fees, however, were soon found necessary as a stimulus to the more efficient discharge of the duties,[7] though no fee was allowed to be charged in case of death by misadventure.[8] But fees in turn often led to an officious zeal, and at last the practice of payment by annual salary was adopted in the case of a county coroner; and this salary is paid out of the county rate.[9] He is authorised to pay the necessary expenses attending each inquest, according to a scale of allowances settled by the county justices, or in boroughs by the town council.[10] He is also authorised to summon and pay medical witnesses, and to direct, if deemed necessary by him, a post-mortem examination, and he is bound to do so on a requisition from a majority of the jury.[11] And such medical practitioner, as may be summoned, is bound under a penalty to attend as a witness.[12]

Removing or dismissing a coroner.—A coroner was liable by several statutes to punishment for misconduct in his office,[13] and he was also liable to indictment on criminal

[1] 1 Bl. Com. 348. [2] 2 Hale, P. C. 57; 1 East, P. C. 383; R. v Ferrand, 3 B. & Ald. 260. [3] 6 & 7 Vic. c. 83, § 1. [4] R. v Johnson, 42 L. J., M. C. 41. [5] 6 & 7 Will. IV. c. 105, § 6; 5 & 6 Will. IV. c. 76, § 63; R. v Perkin, 7 Q. B. 165. [6] West. 1st, c. 10; 2 Inst. 173; 1 Bl. Com. 347. [7] 3 Hen. VII. c. 1, § 4; 2 Inst. 176; 25 Geo. II. c. 29; 1 Vic. c. 68, § 3. [8] 1 Hen. VIII. c. 7. [9] 23 & 24 Vic. c. 116. [10] 1 Vic. c. 68; 23 & 24 Vic. c. 116, § 4. [11] 6 & 7 Will. IV. c. 89; 1 Vic. c. 68, § 2; 23 & 24 Vic. c. 116, § 1. [12] 6 & 7 Will. IV. c. 89, § 6. [13] 3 Ed. I. c. 9; 1 Hen. VIII. c. 7; 3 Hen. VII. c. 1; Hale, P. C. 58.

information for gross misconduct.[1] The ancient mode of getting rid of him was by a writ of *de coronatore exonerando*, which assigned reasons why he should be removed from the office, as age, illness, corruption, imprisonment, or an incompatible office.[2] This writ was issued by the Court of Chancery on a petition of the freeholders, verified by affidavit, and the coroner had notice of its contents;[3] though it was held that he could not traverse the cause recited in the writ.[4] An enactment facilitated the same object by allowing a court, before which certain coroners were convicted, to adjudge, that they should be removed from their office.[5] And the Lord Chancellor is now expressly authorised to remove all coroners for inability or misbehaviour in their office, as for example for drunkenness.[6]

If coroner's court a public court.—It has been disputed whether the coroner's court is a public or private court. The notoriety of the inquiry and the supposed duty of all to attend no doubt practically made it so. And the coroner, though nowhere expressly ordered to hear witnesses on both sides, is clearly bound by the rules of justice to hear one side as well as another, seeing that his sole object is the truth.[7] And counsel have a right to be heard for a party concerned in the inquest, as well as for the friends of the deceased party. Indeed if a witness is willing to give evidence which may criminate him, it is no part of the duty of the coroner to refuse to examine such witness.[8] But as the inquiry is wide and indeterminate and no individual is charged, and it may end in no accusation being made at all, there is good ground for holding, that the court is not an open court, and that the coroner has a discretion as to admitting persons not interested or not closely connected with the inquiry. At least a coroner has been held entitled to exclude at his discretion from his court a person in no way interested in the subject.[9] Cases may occur in which privacy may be requisite for the sake of decency; others in which it may

[1] R. v Scory, Leach, C. C. 43. [2] 2 Inst. 132; Fitz. N. B. 163; Ex p. Parnell, 1 J. & W. 452. [3] 3 Atk. 184; Re Ward, 30 L. J., Ch. 775. [4] 5 Rep. 58; Fitz. N. B. 164. [5] 25 Geo. II. c. 29, § 6. [6] 23 & 24 Vic. c. 116, § 6; Re Ward, 30 L. J., Ch. 775. [7] 2 Hale, P. C. 60; R v Ingham, 5 B. & S. 257. [8] Wakely v Cooke, 4 Exch. 511. [9] Garnett v Ferrand, 6 B. & C. 611.

be due to the family of the deceased; and the propriety of the coroner's decision on this subject cannot be questioned. Moreover, a coroner's court being a court of record, one of the incidents of such court is, that the judge is not liable for any mistake made in performing the duties of judge.[1] But it is not a continuing court, and if it is adjourned to a particular day, and no court is held or further adjourned, the proceeding drops and cannot be resumed.[2]

The coroner's jury and verdict.—The jury assisting the coroner is taken from the neighbourhood, that is to say, from the county at large, and he may fine jurymen for not attending.[3] Their number must exceed twelve. And if a majority of twelve agree, their verdict may be accepted; but if such a majority do not agree, they can only after a reasonable time be discharged.[4] Though by analogy to other cases the jury should accept the views of the law, laid before them by the coroner, and confine themselves to the finding of facts; yet if they do transgress their province, there is no way provided for remedying their mistake, and the old remedy of proceeding by attaint against juries was abolished in 1826.[5] When the coroner's inquisition is drawn up, it is equivalent to a finding by a grand jury; and the party charged may be tried upon the inquisition, and technical objections are to some extent restrained;[6] and the trial may be directed by the High Court to be had in a different place from the venue in the inquisition.[7]

Attempts to murder how far crime.—The crime of murder necessarily supposes, that life has been taken, but owing to the variety of circumstances which may interpose between the felonious design, existing in the mind of the murderer, and the execution of that design, it frequently happens that the intention has fallen short of a fatal issue. The essence of all crime being the state of mind and the evil intent, the guilt of the chief actor may, in point of morality, be the same as if the fatal result which he intended, and took the means to effect, had been duly attained; nevertheless, the law gives him the benefit

[1] Thomas *v* Churton, 2 B. & S. 475. [2] R. *v* Payn, 34 L. J., Q. B. 59. [3] 7 & 8 Vic. c. 92, § 17. [4] 2 Hale, P. C. 297. [5] 6 Geo. IV. c. 50, § 62. [6] 6 & 7 Vic. c. 83, § 2; 14 & 15 Vic. c. 100, §§ 23, 24; R. *v* Ingham, 5 B. & S. 257. [7] R. *v* Palmer, 5 E. & B. 1024.

of this result, and if death is not actually caused, his offence is not punished in the same manner as his conduct deserved. The attempt to murder is established by proof of using the same means, as if murder had been committed, as by stabbing, shooting, beating, poisoning, strangling: nevertheless there is less strictness in proving the malice, which is so important in all prosecutions for murder, and the punishment also falls short. The most usual case in attempts to murder, is where some wound or bodily injury has been caused, but nothing more.

Ancient law of lex talionis.—At this point we come upon an early remedy for maiming the body, which, however discordant with modern ideas, recommended itself in its time to nearly all barbarous and semi-barbarous nations as the most just, equal, and unexceptionable law that it could enter the mind of man to conceive. This was the *lex talionis*, which has prevailed in all places and times, and which still claims the allegiance of savage tribes. It has left traces which to this day are discernible in many forms common in every law of the world, and even linger in minds that have no obvious suspicion as to its parentage. The law of Moses recognised this ancient practice of retaliation, by which an eye was given for an eye, and a tooth for a tooth.[1] And it was deemed at that period a just and equal law, for rich as well as poor, and was moreover confined to cases of deliberate maiming, and optional to the aggrieved person.[2] This law was deemed also just by the Athenians,[3] and was followed in the twelve tables of the Romans.[4] The Ripuarians, Alamans, Lombards, and Frisians also had a tariff of punishments for every grade of assault and mutilation.[5]

[1] Lev. xxiv. 19, 20; Exod. xxi. 23, 24, 25. [2] Michaelis, Com. § 240. [3] Petitt, Leg. Attic. vii. 3.

[4] Tab. vii. In the Gentoo code the law of retaliation was in full force. In some cases it was pushed to extremes. To strike a Brahmin was punished with the loss of the limb. And if a magistrate was beaten or ill-used, the culprit had an iron spit put through him, and was roasted at the fire.—*Gent. Code*, c. 16. The Indians of the Rocky Mountains to this day look upon this law as admirable justice.—1 *Schoolcr.* 263, 277. It also prevails in Alaska.—*Dall's Alaska*, 416.

[5] About 1128 the charter of the French borough of Laon expressly laid down the *lex talionis* for that place.—3 *Guizot, Civ. Fr.* lect. 17.

The lex talionis in England.—The *lex talionis* also flourished in this country. In Ethelbert's laws as well as King Alfred's, a minute scale of compensation was laid down for all kinds of bodily injuries, according as the blow exposed the bone or broke the skin, lamed a shoulder or pierced an ear or a nose, broke a collar-bone or front tooth, a toe or the nail of a toe.[1] The law stated by Britton as to maiming was this:—If the wound was what was called a mayhem, that is, the loss of a member whereby a man was rendered less able to fight, as an eye, a hand, a foot, or fracture of a skull bone, or the loss of the fore teeth, this was a ground of appeal of mayhem. The fore teeth were deemed useful in battle, for if the wound cost nothing more serious than the molar teeth, or an ear, or the nose, these were deemed mere disfigurements, but not mayhems. This appeal was, however, an alternative remedy. In order to avoid the perilous risk, an action of trespass was competent. The risk of the appellor was, that if he failed, owing to some error in the record, he might be committed to prison and ordered to make satisfaction to the defendant, and also to the king. On the other hand, if the appellee was vanquished in battle, or was found guilty by a jury, the judgment was, that wound should be inflicted for wound, imprisonment for imprisonment, and trespass for trespass. And yet so early as the time of Edward I. the crown exercised the power of substituting for this punishment the imprisonment of the appellee in irons, till he made satisfaction to the plaintiffs, after which he was punished for breach of the peace also. If a writ of trespass issued for like mayhems, the judgment was the same. But in some cases, where, for example, a ribald or worthless person struck a knight or honourable person in time of peace without provocation, he was sentenced to lose the hand wherewith he had offended.[2]

Thus by the ancient law of England, he that maimed any man, whereby he lost any part of his body was sentenced to lose the like part, *membrum pro membro*.[3] But this went afterwards out of use, partly because the law of retaliation is at best an inadequate rule of punishment,

[1] Laws of Ethelbert, A.D. 597–616; Laws of K. Alfred, A.D. 871–901. [2] Britt. b. i. c. 26; Bract. 145; Fleta, 58–60. See the Gentoo law, *ante*, p. 412. [3] 3 Inst. 118.

and partly because upon a repetition of the offence the punishment could not always be repeated.[1] It was found necessary even at an early date to pass statutes to correct the vagueness of this popular law.

Defects of the lex talionis.—It is not to be wondered accordingly that the *lex talionis* should have failed to give satisfaction even in the earliest times. The philosophers have exposed its want of justice and equity, for, besides the impossibility of always imposing the same injury on the assailant, there is this essential difference, that in a premeditated and expected attack the pain is doubly and trebly greater than is endured in an unexpected and comparatively accidental injury.[2] There was also the difficulty of settling the tariff of equivalent pains. The old Welsh law ably solved a difficult point in this respect, when it estimated the worth of the tongue as equal to that of all the other members, on the ground that it defended them.[3]

But the crucial case which must have always haunted the human mind with interminable doubt and uncertainty was the case of the one-eyed man. The inability to deal at all fairly with this peculiar difficulty could not fail to have much to do with the final abandonment of the principle altogether, seeing that no court, no judge, no legislature, no jury could ever satisfactorily dispose of it. When a two-eyed man put out the eye of a one-eyed man, Diodorus Siculus relates, that the Sybarite judges doubted whether both eyes, or only one, of the offender should be put out.[4] And Solon was said to have shown great wisdom in expressly enacting, that both eyes should be put out.[5] The wisest of men, however, could never hope to show sound and adequate reasons for preferring either of these solutions to the other.[6]

Statutes against maiming and wounding.—The legislature soon began to see, that bodily maimings required appropriate

[1] Bract. fol. 144. [2] Michaelis, Com. § 242. [3] Vened. Code, b. iii. c. 23. [4] 9Mem. Acad. Inscr. 175. [5] Diog. Laert. Sol.; Diod. Sic.

[6] Another difficulty is admirably brought out by Bacon in his *Apopthegms.* A Flemish tiler once fell from the top of a house on a Spaniard and killed the latter, though he himself escaped. The next in blood demanded the *lex talionis*, whereupon the judge said he must go up to the top of the house and fall down on the tiler.—*Bac. Apopth.* 70.

punishment of another kind than the first thoughts of mankind assigned to them. The first specific enactment against mutilation was 5 Henry IV. c. 5, which declared it to be felony maliciously to cut out the tongue or put out the eye; but other mutilations were not named, and could not, according to the rules of law, be implied.[1] That statute was supposed to be passed, in order to put down a practice of robbers trying by this cruel expedient to make it impossible for their victims to give evidence against them. Coke, however, said that before that statute some kinds of mutilation were felonies at common law.[2] By a statute of Henry VIII. if a man's ear was maliciously cut off, a fine was payable to the king, and treble damages recoverable by action.[3] The Stabbing Act of 1 James I. c. 8, which took away the benefit of clergy from that offence, was supposed to have been caused by the practice of the Scotch, who, on flocking to England in that reign, used dirks in cases of provocation, to which mode of surprise the English were unaccustomed.[4] Juries were then in the habit of reducing homicide, which was caused on verbal provocation, to manslaughter. And all the judges met at Serjeant's Inn in 1666, and held that that statute was only a declaration of the common law, and made to prevent the inconveniences of juries trying to extenuate murder by finding some provocation.[5] And by the 22 & 23 Charles II. c. 1, called the Coventry Act, which was occasioned by an assault on Sir John Coventry in the street, and slitting his nose, in revenge, as was supposed, for some jest on Charles II. and Nell Gwynne, uttered by him in Parliament, such attacks on the nose, eyes, tongue, or lips, with intent to maim or disfigure, were declared felonies. Next came the Black Act, 9 George I. c. 22, which extended the same law to maliciously shooting, and other statutes of George III. and George IV. followed. All these have been swept away, and are replaced by the statute of 1861.[6]

These enactments now divide the subject into attempts at wounding, poisoning, &c., with intent to murder; and those which cause danger to life or bodily harm. The

[1] 5 Hen. IV. c. 5. [2] 3 Inst. 62. [3] 37 Hen. VIII. c. 6. [4] Barringt. Stat. 544; R. v Kerl, L. Raym. 139. [5] Kel. 54; 18 St. Tr. 305. [6] 24 & 25 Vic. c. 100.

mode is to single out for punishment the most usual means employed, in order to effect the general design or intent, or which produce the effect described.

The modern crimes of attempts to murder.—The statute enacts, that whosoever, with intent to commit murder, administers poison or other destructive thing, or by any means causes grievous bodily harm—or uses gunpowder to a building—or fires a ship—or shoots with loaded arms—or attempts to drown or suffocate—all with such intent—or by any other means attempts to commit murder, is guilty of felony and is liable to penal servitude for life.[1] The intent to murder here mentioned, coupled with the overt act of means being used or attempted, is the important and essential characteristic of this class of crimes; and as in the analogous case of actual murder, the intent need not be directed against the specific individual on whom it falls; for if by mistake the poison or the blow reach a third party in regular course of things, though not contemplated by the perpetrator, the guilt is the same.[2] The intent to murder may be either a primary or secondary intent.[3] And if it would have been murder if death had resulted, this will always be a good ground for inferring the intent to murder;[4] but it must be an intent to murder, not merely to disable a person temporarily.[5] The bare intent in the mind is not enough, unless some overt means be used, by way of carrying out that intent, as by shooting at the person, or laying poison for him, or doing acts of that malicious character. And not only must there be an overt act, that is, some means actually used to give effect to the intent, but those means must be reasonably calculated to effectuate the intent.[6] Thus the means will be insufficient if a gun be not loaded when pointed, as, for example, if it be plugged, or the flint had fallen out;[7] or at

[1] 24 & 25 Vic, c. 100, §§ 11-15; or not less than five years' penal servitude.—Ibid; 27 & 28 Vic. c. 47, or two years' imprisonment, hard labour, and solitary confinement.

[2] R. v Smith, 25 L. J., M. C. 29; R. v Lynch, 1 Cox, C. C. 361; R. v Lewis, 6 C. & P. 161. [3] R. v Gillow, 1 Mood. 85; R. v Davis, 1 C. & P. 306. [4] R. v Jones, 9 C. & P. 258. [5] R. v Boyce, 1 Mood. 29. [6] R v Empson, Leach, 224; R. v Lovel, 2 M. & Rob. 39. [7] R. v Carr, R. & Ry. 377; R. v Harris, 5 C. & P. 159; R. v Lewis, 9 C. & P. 523.

least when not loaded, if it were not sufficiently near to cause harm;[1] or if the gun be used too far off to harm.[2] And it lies on the prosecution to give some evidence that the gun was loaded or the means used were sufficient;[3] though, considering that the fear of the person aimed at is the same, and the matter is often so great an uncertainty, this rule seems unjust, and the prisoner ought to be bound to disprove the possibility of harm. The gun, however, is not the less "loaded" merely because the means of firing it failed.[4]

To administer poison, within the meaning of this enactment, means to put it in such a situation, that it will in the course of things in all probability be taken by the person intended, though the party administering was not present when the poison was taken.[5] And it is not the less a ground of inferring an intent to murder, that the immediate object was merely to cause a miscarriage.[6]

The word "wound" has been so interpreted as not to include an injury which does not break the skin,[7] and not to include, for example, a kick which merely ruptured an interior vessel, unless blood flowed from the rupture.[8] At one time the biting off a finger was said not to be a wound when the word "wound" alone was used in the statute, for wounding implied that an instrument was used;[9] but now it is immaterial, whether an instrument is used or not, as all means are included in the present statute.

In an indictment for wounding, &c., with intent to murder, it is wholly unnecessary to set forth the details of the means used to carry out the intent; but whether it was by poison or wounding, &c., should be stated generally, and the intent should be stated. And though the prisoner cannot be found guilty of a common assault under the indictment;[10] he may be found guilty of unlawfully wounding.[11]

The modern crimes of causing grievous bodily harm.—

[1] R. v Kitchen, R. & Ry. 95. [2] R. v Abraham, 1 Cox, C. C. 208. [3] Whitley's Case, 1 Lew. C. C. 123. [4] 24 & 25 Vic. c. 100, § 19. [5] R. v Harley, 4 C. & P. 369; R. v Dale, 6 Cox, C. C. 14; R. v Farrow, D. & B. 164. [6] R. v Wilson, D. & B. 127. [7] R. v Wood, 4 C. & P. 381; 1 M. & Rob. 527; R. v Payne, 4 C. & P. 558. [8] R. v Jones, 3 Cox, C. C. 441; R. v Waltham, 3 Cox, C. C. 442. [9] R. v Stevens, 1 Mood. 409. [10] 14 & 15 Vic. c. 100, § 10. [11] Ibid. c. 19, §§ 4, 5.

While in those crimes called attempts to murder, the intent is the vital element, there are many cases in which grievous bodily harm is done, and the intent does not go the length of killing, but only of wounding and causing pain. Accordingly, the statute has defined as separate offences those which actually cause grievous bodily harm by whatever means, though not with intent to kill the wounded party; and these are also felonies, and punishable in the same way.[1] The various means of shooting, strangling, stupefying with chroloform, and poisoning, are specially named as usual means for this class of offences also.[2] The intent to maim or disfigure is an inference from the facts, and in some cases it is scarcely possible to infer any other intent than the more serious intent to murder.[3] But if there is an intent to frighten, though not an intent to do grievous bodily harm, and the latter is nevertheless done, the malicious intent will be presumed.[4]

And where the same means of poisoning are used, but only with intent to injure, aggrieve, or annoy, it is a misdemeanour.[5] And to administer a drug to excite the sensual passion is to aggrieve and annoy.[6] But where no weapon is used, but grievous bodily harm is done, the crime is reduced to a misdemeanour.[7] In this last offence the intent does not require to be proved, provided the circumstances show it was an unlawful or malicious wound or harm. And on an indictment for this misdemeanour, the defendant may be found guilty of an assault.[8] Moreover where a person is indicted for the felony of poisoning, he may be acquitted of that felony and convicted of the misdemeanour.[9]

Mutilation of the body for special objects.—Under this head of maiming and wounding would come all acts which maim or injure the body grievously, whatever the inten-

[1] 24 & 25 Vic. c. 100, § 18; 27 & 28 Vic. c. 47. Penal servitude for life, or not less than five years, or two years' imprisonment with or without hard labour.

[2] 24 & 25 Vic. c. 100, §§ 19-23. [3] R. v Sullivan, Car. & M. 209; R. v Odgers, 2 M. & Rob. 479. [4] R. v Ward, 41 L. J., M. C. 69.

[5] 24 & 25 Vic. c. 100, § 24. Penal servitude for five years, or two years' imprisonment with hard labour. [6] R. v Wilkins, 1 L. & C. 89. [7] 24 & 25 Vic. c. 100, § 20. [8] R. v Taylor, L. R., 1 C. C. R. 194; R. v Oliver, Bell, C. C. 287; R. v Sparrow, Bell, C. C. 298.

[9] 24 & 25 Vic. c. 100, § 25.

tion be; and though the immediate object be to produce a state of health or a particular incapacity with an ulterior view, irrespective of malice. Such attempts to maim others against their will, and professedly for their own advantage, are indeed unknown in this country, though in eastern countries they are not unfrequent.[1]

Causing bodily harm by spiteful acts and conduct.—Other modes of causing bodily harm have been expressly provided for by statutes. Thus, where a master or mistress being legally bound to supply food, or clothing, or lodging, by neglect or refusal causes bodily harm, so as to produce permanent injury to a servant or apprentice, this is a misdemeanour.[2] The ability to supply the food in such cases must, however, be shown, for the master may have none to give, even though he may have applied to the workhouse for relief.[3] And it is felony if gunpowder, or explosive, or noxious, or corrosive substances are used to do grievous bodily harm in ships or elsewhere.[4] And it is the same to put stones and articles on railways, or remove signals, or cause other interruptions, or to throw stones at railway carriages so as to endanger the safety of railway travellers;[5] and any wilful or unlawful act done to endanger railway travellers is a misdemeanour.[6] With regard to these offences, it is enough, that the act might have endangered the safety of persons carried in the railway carriages or trucks, though no actual harm resulted.[7]

Aiding another in self-mutilation.—A person who maims himself or procures another to do so, in order that he may be better enabled to beg, or prevent himself being pressed for

[1] Semiramis is said to have introduced the order of eunuchs.—*Gibb. Rom. Emp.* c. 31. And the practice of mutilation has since extensively prevailed in Eastern countries. Voltaire complained of chorister boys being mutilated.—*Volt., Becc.* c. 20. Domitian gained applause by prohibiting the practice altogether, as regards children. —*Suet. Dom.* c. 7; *Justin. Ap.* ii. And Aurelian prohibited more than a certain number of eunuchs to be kept.—*Aurel. Vict.*

[2] 24 & 25 Vic. c. 100, § 26. Five years' penal servitude, or two years' imprisonment. [3] R. *v* Chandler, Dearsl. 453; R. *v* Pelham, 8 Q. B. 959. [4] 24 & 25 Vic. c. 100, §§ 28, 29, 30. Penal servitude for life, or not less than five years, or two years' imprisonment. [5] Ibid. §§ 32, 33. [6] Ibid. § 34. [7] R. *v* Holroyd, 2 M. & Rob. 339; R. *v* Bradford, 8 Cox, 309.

a soldier, was said by Hale to commit a misdemeanour, and both are liable to fine or imprisonment.[1]

Self-mutilation, if a crime.—Since suicide is treated as an unlawful act, and any aiding and abetting of it a misdemeanour, it might be expected that any inferior degree of the same wrong, consisting in any kind of self-mutilation, would be treated as a crime, especially as the power of punishment, which in the case of suicide becomes impossible, is available for any self-imposed injury short of self-murder. Such an injury seems indeed rare, and the love of life is a secure safeguard against it; yet self-mutilation seems a crime under our law. It is true, the motives that impel to it, whether religious, fanatical, or mercenary, have long ceased to have any hold on the mind. Priests and scholars, courtiers and chamberlains, feel no overpowering motives to any such conduct; and hence the only punishment that has yet been assigned to it is that for misdemeanour.[2] But in the naval service, if a marine wilfully maim himself or another marine, or cause himself or another to be maimed, whether on request or not, or tamper with his eyes with intent to render himself or the other unfit for service, he may forfeit all his right to pensions and good conduct pay; yet further than this collateral liability, punishment there is none.[3] And the Articles of War, which also apply to army and navy, treat any self-mutilation, so as to render one unfit for service, as an offence.[4]

[1] 1 Hale, 412. [2] Ibid., P. C. 412. [3] Mar. Mut. Act, 39 Vic. c. 9, § 31.

[4] Art. of War, § 81. Savages mutilate themselves for various reasons, the origin of which can scarcely be traced. The lip-ring worn by the Manganya women in Africa, hideous as it was, was traced to nothing beyond a conformity to fashion.—*Livingst. Zamb.* 117. The Ethiopians were said to have a law, that if their king became maimed or wounded by accident, all his domestics were compelled to wound themselves in the same way, and at his death to kill themselves.—*Diod. Sic.* Among some tribes, when a marriage occurs, instead of a ring being put on the finger, one of the finger-joints is cut off.—*Whately, Civilis.* The Roman Galli, or priests of Cybele, mutilated themselves. In Tongking it was said, that mutilation was the only mode of obtaining rapid promotion in the state.—3 *Univ. Mod. Hist.* 450. In India, devotees resort to self-mutilation for holy purposes, will swing on hooks, hanging themselves head downwards over a fire, will roll on a bed of prickly thorns, will jump on a couch filled with sharp

knives, will bore holes in their tongues; stick their bodies full of pins and needles, or hold their arms over their heads till they stiffen. —*Clarke*, *Ten Relig.* 83. Democritus is said to have deprived himself of sight in order to be undisturbed in his studies.—*Cic. de Fin.* v. 29.

It was reckoned by the Early Church that he who disfigured his own body by cutting off any member, or part thereof, without just reason, was guilty of a species of self-murder, as being an enemy of the workmanship of God.—*Canon Apost.* c. 21; *Conc. Nic.* can. 1.

"The ascetic epidemic of the fourth and fifth centuries is a singular episode in the moral history of mankind. A hideous, sordid, and emaciated maniac, without knowledge, without patriotism, without natural affection, passing his life in a long routine of useless and atrocious self-torture, and quailing before the ghastly phantoms of his delirious brain, had become the ideal of the nations which had known the writings of Plato and Cicero, and the lives of Socrates or Cato. For about two centuries the hideous maceration of the body was regarded as the highest proof of excellence."—2 *Lecky*, *Hist. Mor.* 114.

CHAPTER V.

RESTRICTIONS ON HUMAN ACTIONS OWING TO COMPULSORY ACTS AND DUTIES.

Contrast between ancient and modern law, as to minute interference with daily conduct.—There is nothing which so clearly distinguishes modern from ancient law as the practice of coercing and harassing individuals in their ordinary avocations, for petty objects, in petty ways, and with inadequate and abortive results. The ancients, having no definite view as to the precise function of municipal law, were imbued with the notion that it must be closely connected with the practice of all the virtues, that law must be the means of compelling people to act rightly, much more than to avoid acting wrongly. The logical consequence followed, that men ought, in their view, to be dragooned into the paths of rectitude—should be led, and watched, and driven. Men, according to them, could not aspire to have any will of their own, but must, and ought to be made to feel, that the government, or supreme authority, should be the infallible dictator for nearly all the emergencies of their daily life—acting like a vigilant parent on the watch for every devious tendency, and actively encouraging and rewarding every effort to do right. When it is considered how their notions of virtue were mixed up with their intricate machinery of gods and oracles, and how slavery was the accepted basis of society, many of their laws and methods could not fail to be far apart from modern notions and practices. Our practice has indeed settled into something like the converse of theirs. We start with the axiom, that the interference of government is not necessarily good in itself, if the object can be otherwise attained, and that its interference is at least irksome, and seldom or never

effective when it seeks to coerce and harass the mind beyond a very limited range—that its supreme virtue is negative, and that there is nothing so conducive to order and rectitude as to let the better tendencies develop naturally. The law merely prepares a suitable soil for these to grow and ripen, taking care at the same time, and above all, to repel and subdue all who seek to interfere with personal freedom.[1]

It is not to be wondered that many large chapters of the law, which in ancient times claimed serious attention, are altogether omitted, and find no place in the law of the moderns. And after dealing with the more substantial rules and enactments which form the substantive law as to threatened and actual injuries, it is next incumbent to dispose of some of these minor details, which have lost their importance and significance, are now all but obsolete, and yet in their time gave much trouble to all legislatures, and had a place in our own law to a large extent, and up to the time of Bacon. Such laws are here introduced because they concern the individual person more closely than any of the other divisions of the law. They are not sufficiently general and precise to be classed under the head of contracts, or of the carrying on of those ordinary occupations, which consist only in making a succession of contracts, or in doing what is ordinarily termed the business of life, but are rather restrictions on the power of disposing of one's own person, or faculties, or time, in the manner which free men naturally aspire to in all countries and under all

[1] The Areopagus at Athens not only punished impiety and immorality, but rewarded those eminent for virtue.—*Potter*, *Gr. Ant.* b. i. c. 19. It called on persons suspected of idleness to give an account of how they lived.—See Poor Laws, Chap. vi. And to render its judgments unimpeachable, and demonstrate that it paid no respect to persons, it is said the court sat in the dark to decide its cases; but scholars differ as to this point. The Carthaginians had also a *prefectus morum* to censure immorality.—*Alex. ab Alex.* b. iii. c. 13. Plutarch, with the authority of an eye-witness, says: "The Romans did not think it proper that anyone should be left to follow his own inclinations without inspection and control, either in marriage, in the procreation of children, in his table, or in the company he kept; but appointed censors to inspect, to correct, and chastise such as gave way to dissipation and licentiousness, and deserting the ancient way of living. The censors could deprive a knight of his horse, and they took an estimate of each citizen's estate, and enrolled them according to their pedigree, quality, and condition."—*Plut. Cato.*

circumstances. Many of such laws have often been called sumptuary laws, but the body of rules known by that general name were never connected together on any defined principle. Yet one or two minor points peculiarly belong to that division of the law which treats of the security of the person, and this is so, merely because they are not so closely connected with any other division, and nevertheless cannot be entirely disregarded in any complete account of the municipal law.

Sumptuary laws.—Sumptuary laws, that is to say, laws which profess to regulate minutely what people shall eat and drink, what guests they shall entertain, what clothes they shall wear, what armour they shall possess, what limit is to be put to their property, what expenses they should incur in their funerals, were considered by the early and middle ages as absolutely necessary for the proper government of mankind. The legislatures of all ages, until the last two centuries, took for granted, that they could not choose but lay down rules of this minute personal and harassing description. Of all such delusive notions as to the proper business of government, Montaigne aptly disposes in a sentence: "To enact that none but princes shall eat turbot, shall wear velvet or gold lace, merely sets every man more agog to eat and wear them."[1]

Laws relating to things strictly personal.—These miscellaneous laws consist of restrictions on locomotion, on services or occupations, on the use and change of one's name, on dress, on clothing, on food—all closely connected with the person.

Right of locomotion.—The right to go and come without hindrance or impediment may be said to be one of the primary elements of personal liberty; and it has been generally allowed. In the city of London, it is true, many centuries ago, if one was abroad after curfew without a lantern and a warrant authorising him, he was arrested, and next morning punished by the mayor.[2] But the right to go on the highway or street at all times of day and night,

[1] Montaigne, b. i. c. 43. Some sumptuary laws went extravagant lengths, but each probably had some evil of the time in view. Tiberius issued an edict against people kissing each other when they met, and against tavern-keepers selling pastry.—*Suet. Tib.* Lycurgus even prohibited finely decorated ceilings and doors —*Plut. Lycurg.*

[2] Temp. 13 Ed. I.

without licence, without challenge, and without incurring legal responsibility of any kind, is a part of daily life, which nothing but an express statute can take away or in the smallest degree control.[1]

Compulsory occupations as servants.—It is scarcely to be wondered, considering the social disorder created by idleness and beggary, and in times when slavery was no longer the portion of nearly all the poor, that compulsory work should sometimes have been enjoined. The Statute of Labourers, reciting the pestilence and scarcity of servants, made it compulsory on every person who had no merchandise, craft, or land, on which to live, to serve at fixed wages, otherwise to be committed to gaol till he found sureties.[2] And at a later day all men between twelve and sixty not employed were compellable to hire themselves as servants in husbandry; and unmarried women between twelve and forty were also liable to be hired, otherwise to be imprisoned.[3] These enactments are now repealed, and the only bearing of what remains to be said on this subject is more properly treated under the head of poor laws and begging.[4]

Compulsory hosts.—It may seem surprising, that the law should ever have found it necessary to make it obligatory on any one to receive guests against his will. At one time, however, our legislature was so sensible of the mischief of aliens coming to England and selling goods to each other, that, as a check on their proceedings, it was made compulsory on the mayors, sheriffs, and bailiffs, of every city, town, and port, to assign hosts, with whom these foreign merchants were to be boarded, so as to be under surveillance. The hosts were to be reasonably remunerated.[5] But they were under a heavy penalty to act, and, as part of their duty, to be parties to each sale by the foreign merchants, and above all to see to the application of the price after the buying of English goods by foreigners. If a

[1] Traces of some restriction are found of ancient date. A licence to travel seems to have been granted in the time of Elizabeth.—*Burn's Star Ch.* 81. A proclamation has been issued requiring all persons to return to their country houses, and it was enforced by the Star Chamber.—2 *Hallam, C. H.* 26. The prohibition to leave the country on the ground of debt or litigation pending and arrest on suspicion will be stated *post*, Ch. vii.

[2] 25 Ed. III. St. 2. [3] 5 Eliz. c. 4. [4] See *post*, Ch. vi.

[5] 5 Hen. IV. c. 9.

foreign merchant had not a host, he was liable to be arrested and imprisoned till he found bail.[1] All this compulsory entertainment of guests has long disappeared, and nothing remains of it, except, perhaps, that species of it, called the billeting of soldiers.[2]

Billeting of soldiers on householders.—The compulsion under which housekeepers are placed in receiving soldiers as temporary guests, seems to have been deemed an inevitable accompaniment of a standing army. It was, however, felt to be an intolerable grievance and vexation in the time of Charles I., and in the Petition of Right it was expressly claimed "that His Majesty would be pleased to remove the said soldiers and mariners, and that his people might not be so burdened in time to come."[3] That enactment extinguished whatever there was of common law (if indeed it was possible for such to exist) to support so hateful a duty as that of receiving sojourners of the military or naval force into the houses of inhabitants at the dictation of any commander. And the Act of Charles II. declared, that no officer should thenceforth presume to billet soldiers on any inhabitant without his consent.[4]

In the movement, however, of a standing army through the country, it is all but impracticable to provide suitable lodging without some compulsory hospitality. And this

[1] 18 Hen. VI. c. 4 (1439).

[2] The Gentoos went much further in the law of hospitality, for with them it was a penal offence for a guest who accepted an invitation, not to go to the host's house, or for the host not to give his guest something to eat; and moreover, if the guest did not eat what was provided, he was bound to repay the expense.—*Gent. Code*, c. 21.

[3] 3 Ch. I.; 2 Parl. Hist. 283.

[4] 31 Ch. II. c. 1. The way in which the petition of the House of Commons alluded to this grievance was as follows: "By the fundamental laws of this realm every freeman hath, and of right ought to have, a full and absolute property in his goods and estate; and therefore the billeting and placing soldiers in the house of any freeman against his will is directly contrary to the said laws, &c. Yet a new and almost unheard of way hath been invented and put in practice to lay soldiers upon them, scattered in companies here and there, even in the heart and bowels of this kingdom, and to compel many of your majesty's subjects to receive and lodge them in their own houses, and both themselves and others to contribute towards the maintenance of them, to the exceeding great disservice of your majesty, the general terror of all, and utter undoing of many of your people." —2 *Parl. Hist.* 283.

has been effected by the modern practice of billeting the troops on the occupiers of private houses. To do this in the least hateful fashion requires some machinery involving an inevitable liability, which, so long as it is impartially imposed, is cheerfully submitted to, because unaccompanied with superfluous irritation. The mode of billeting troops continued at the advent of William III. to be still one of the grievances of the people, and by proclamation in 1688, he again prohibited this being done without the consent of the owners, in all houses, except victualling houses and houses of public entertainment. A statute of William III. confirmed this prohibition, and enacted that, during the war, the constables and chief magistrates were to billet soldiers passing towards the sea coast on the inns and public houses, but not on any private house without the consent of the occupier, otherwise the occupier should have his remedy against the magistrate or officer.[1] By another act of Anne[2] the power of billeting was confined either to places within ten miles of the royal residence, or to garrisons where no sufficient barracks were provided, or to the marches of soldiers, and in the last cases for six days only at a time. The courts of law have justly viewed these statutes authorising billeting as infringements on the liberty of the subject, and have given liberal damages to those on whom a soldier was wrongfully billeted by an officer.[3]

The primary burden therefore of receiving billeted soldiers now lies on publicans, who keep victualling houses, and who, if they have not sufficient room, must find other good and sufficient quarters in the immediate neighbourhood.[4] And it is expressly forbidden to billet soldiers in any private houses, or in the house of any shop-keeper, whose dealing is more in other goods and merchandise than in brandy and strong waters.[5] And officers and constables

[1] 1 W. & M. Sess. 2, c. 4, § 17; 11 Parl. Hist. 1395-1409.
[2] 12 Anne, c. 13, § 21. [3] Parkhouse v Foster, 1 L. Raym. 479; 2 Anne, c. 74, § 5. [4] Mutiny Act, 39 & 40 Vic. c. 8, § 63.
[5] Ib. § 67. The victualling houses are described in the act, as "all inns, hotels, livery stables, ale-houses, and the houses of sellers of wine by retail, whether British or foreign, to be drunk in their own houses or places thereunto belonging, and all houses of persons selling brandy, spirits, strong waters, cider, or metheglin by retail." —39 & 40 Vic. c. 8, § 67.

seeking to billet on persons not liable to it are severely fined.[1] The Mutiny Act lays down minute regulations as to the kind of rations, which the innkeeper is bound to supply, down to the very pepper and salt, and the price he shall receive for the same; and also takes care that the charges be paid, if necessary, out of the pay of the officers and soldiers, or failing this, by the agent of the regiment.[2] And at most this burden of billeting cannot extend to more than three days.[3] At one time the publican was allowed to buy out the soldier at a fixed sum,[4] and at another time he has refused to supply the soldiers with rations at the statutory rates.[5] And again the justices have sometimes assessed the price of provisions at a rate higher than the statutory allowance.[6] Ultimately the only right course was found to be to raise the allowance so as to prevent the public-houses being closed against the military altogether.[7] A soldier when billeted can scarcely be said to pay anything for lodging;[8] but he cannot demand at pleasure what room in the house he thinks fit.[9] The soldier's horses cannot be distrained for rent;[10] nor can the horses be quartered beyond a certain distance apart from the men.[11]

Compulsory knighthood.—It sounds singular to modern ears, that our ancestors should have been compelled against their will to be made knights at the call of the king. But as to become a knight was usually only another name for undertaking the obligation of furnishing a war-horse, or taking a share in the wars, and as the dignity also exempted one from the menial office of making beds, or waiting at table in the house of some great baron, our wonder lessens, that the knightly office should be in those times sometimes compelled and sometimes solicited. A statute of Edward II. made all who had forty pounds a year subject to distress, if they did not accept this honour.[12] And Edward III. made frequent use of the same expedient for raising money;[13]

[1] 39 & 40 Vic. c. 8, §§ 86, 87. [2] Ibid. § 66. [3] Ibid. [4] 8 & 9 Will. III. c. 13; 10 Com. J. 309, 478; 11 Parl. Hist. 1413. [5] 12 Com. J. 79, 148. [6] 11 Parl. Hist. 1388, 1479; 13 Geo. II. c. 10; 14 Geo. II. c. 9. [7] 26 Com. J. 600. [8] Mutiny Act, 1876, § 66. His bed-candles and cooking cost only fourpence a day. [9] 1 Clode, 570. [10] Ibid. 571. [11] Mut. Act, 1876, § 63. [12] 1 Ed. II. Lib. Alb. b. iii. p. 1. [13] Barr. Stat. 193; 2 Stubbs, C. H. 282.

and so did Charles I. in his distresses.[1] The Star Chamber moreover assumed to fine persons for not accepting knighthood.[2] But at last a memorable statute was passed, by which thereafter no person was compellable to take the order of knighthood or pay a fine for not doing so,[3] and thus ended the vexation of being encumbered with unsolicited honours.

Compulsory attendance at church.—Compulsion was also used at the time of the Reformation to uphold the Protestant faith and keep people in the right way. Refusing to confess or receive the sacrament was first made subject to fine or imprisonment, and a second offence was felony and death, and involved forfeiture of lands and goods.[4] Those who, having no lawful excuse, failed to attend the parish church in the time of Elizabeth were fined twelve pence—at that time a considerable sum.[5] This penalty was afterwards altered to twenty pouuds per month, but those were exempted, who did not obstinately refuse.[6] The penalty on all above sixteen who neglected to go for a month was abjuration of the realm; and to return to the realm thereafter was felony.[7] And two-thirds of the rent of the offender's lands might also be seized, till he conformed.[8] These laws were wholly repealed in 1844 and 1846.[9]

Restrictions as to names.—The law of most countries seems to have been little disturbed by any details as to the names which individuals bear, how they come to acquire and use them, and when they may change them. Human nature seems disposed to sit easily under the routine which habit engenders, parents bestowing and children taking and adopting their names without question or complaint, as

[1] Ant. Wood's Life, 19. [2] Burn's Star Chr. 85. [3] 16 Ch. I. c. 20. [4] 31 Hen. VIII. c. 14, § 6. [5] 1 Eliz. c. 2, §§ 3, 4, 5. [6] 23 Eliz. c. 1. [7] 35 Eliz. c. 1. [8] 3 Jas. I. c. 4.

[9] 7 & 8 Vic. c. 102; 9 & 10 Vic. c. 59. To these impotent and falsely-conceived enactments we owe, so far as good can ever be indebted to evil, the immortal allegory of the Pilgrim's Progress, which was composed by Bunyan in Bedford Gaol when imprisoned by the justices of the day under this kind of legal authority.

So late as 1789 Bishop Horsley, in the House of Lords, defended the above law as most proper and by no means severe, though he admitted that it should be allowed to be a reasonable excuse that the defendant attended some Dissenting chapel instead of his parish church.—28 *Parl. Hist.* 126.

naturally as the rain falls or the sun shines. Some savage tribes, it is true, attribute a mysterious importance to names of their children, and proceed by rules which often interest the philologer, but can scarcely attract much notice from the lawyer. The importance and necessity of a name are most conspicuously shown in conveyances of property, in registers of marriage, in bequests, in wills, and in legal procedure; and when a mistake occurs in description serious difficulties arise, which are usually only overcome by an expensive array of evidence to vindicate the identity of person. The safety and security of all persons are obviously much enhanced by keeping and adhering to one distinctive name, and though it is no presumption of law, that a change of name is *primâ facie* evidence of fraud, yet such a step almost always requires some explanation, and it is one of the artifices often resorted to for the concealment as well as the perpetration of crime.

How names usually acquired.—Herodotus observed, that the Lycian children took their names from the mother, and not the father, and the mother's genealogy was alone counted.[1] And the same custom was said by Polybius to prevail elsewhere; and modern travellers also find it in Indian races.[2] In Formosa the husband passed into the wife's family, and in some countries the names were confined to families; in others they distinguished only persons.[3]

The earliest practice in this country was for a person to have a christian name and no surname, but merely to add the locality or place of residence, as John of Dale.[4] And in the principality of Wales the simplicity as well as the confusion of earlier times in applying ancestral names have often been conspicuous.[5] Though a christian name had been given in baptism, it used to be said, that if another christian name was given afterwards on confirmation, the latter should be recognised as the true name. The stage of confirmation was deemed at one time convenient for a change being made, since it was the practice once for the bishop to pronounce the person's name at the ceremony of

[1] Herod. b. i. [2] Lubbock's Orig. of Civ. 107. [3] Montesq. b. xxiii. c. 4. [4] Barlow *v* Bateman, 3 P. Wms. 65; 2 Br. P. C. 272. [5] Lower's Patron. Brit. 22.

confirmation, and Sir Francis Gawdy acquired a surname in that way.[1] And it was once thought that though the surname might be changed, the christian name was indelible. But that delusion has been dispelled.[2] The reason of the former impression may have been, that the surname was said to be often taken from the arts or locality, while the christian name was really deemed the distinctive name.[3] But the essential thing now in the eye of the law is the name by which a person is commonly known, and whether he was baptised or not by such name.[4] And hence, when a certain marriage act required the true christian and surname of the parties to be registered, it was held a compliance with that act to state the name by which the party had been usually known, rather than the baptismal name, if there had been a change, and even though the new name had been assumed by a deserter for purposes of concealment.[5]

Change of name how far competent.—Some difficulty has occurred from the wish which may naturally occur, for various reasons, to change the name which an individual has once borne. The law of England has not found it necessary to declare it to be a penal offence to change one's name, nor is any liability whatever incurred for the mere change, though there necessarily results some inconvenience in any sudden operation of that kind. During the civil war it is said to have been a frequent occurrence for persons to change their name for purposes of concealment.[6] The only matter of doubt has been as to the proper mode of effecting the change; but the rule is, that any one can at any time change his name, if he choose deliberately

[1] Gawdy's Case, 1 Inst. 3; 2 Burn's Ecc. L. "Confirm." [2] R. *v* Billinghurst, 3 M. & S. 254. [3] Ibid.; Button *v* Wrightman, Poph. 57. [4] Walden *v* Holman, 6 Mod. 115; R. *v* Billinghurst, 3 M. & S. 250.

[5] R. *v* Burton-on-Trent, 3 M. & S. 537.

The cases as to fraudulent use of names at marriage belong to the division of law intituled "Security of Marriage." Cases as to conditions annexed to devises or bequests, that the devisee or legatee shall use the name of the testator, belong to the division of law intituled "Security of Property." The law as to registration of births is stated *post*, Chap. ix. "Age." And the effect of mistakes in the name in legal procedure belongs to the division of the law intituled "Judicature." [6] Barr. Stat. 372.

to do so and to act accordingly. And the Roman law also allowed the same liberty.[1]

There is no ceremony or legal act required, in order to effect a change of name, except only the declaration of a settled purpose and the adoption of some means of making it known. Any mode of telling one's neighbours and the public, that a new name has been and is intended to be adopted and recognised, is sufficient to constitute a change of name, and no deed need be executed, and no royal licence or act of parliament need be obtained for this purpose. These are only at best another means of publicity, and nothing more. Lord Eldon said the king's licence is nothing more than permission to take the name, but does not give it; and that a man taking such new name may take a legacy if left to him under the old name.[2] And Tindal, C. J., said, "The royal sign manual is a mode which persons often have recourse to, because it gives a greater sanction to it, and makes it more notorious; but a man may, if he pleases, and if it is not for any fraudulent purpose, take a name, and work his way in the world with his new name as well as he can." And hence there was no real necessity for any person to apply for a royal sign-manual to change the name.[3] And Lord Tenterden said that a name assumed by the voluntary act of a young man at his outset into life, adopted by all who knew him, and by which he is constantly called, becomes for all purposes as much and effectually his name, as if he had obtained an act of parliament to confer it upon him.[4] The general use and habit is everything, when the true name of a person at a particular time is required.[5]

Though any man may at discretion change his name by

[1] Cod. b. ix. tit. 25. The Roman law was severe in case of a person who assumed a false name, for he was guilty of forgery (*falsum*), the punishment for which was banishment or crucifixion. —*Dig.* xlviii. 11, 13. In Lucca a person was fined for changing his name, and in case of nonpayment his tongue was cut off.—*St. Lucc.* c. 88; *Barr. Stat.* 372, 381. Pope Pius II. put to the rack Platina for instigating changes in people's names.—*Platina's Popes by Ricaut*, 409, 411.

[2] Leigh *v* Leigh, 15 Ves. 100. [3] Davies *v* Lowndes, 1 Bing. N. C. 618. [4] Luscombe *v* Yates, 5 B. & Ald. 544; Barlow *v* Bateman, 3 P. Wms. 65. [5] Per L. Stowell, Frankland *v* Nicholson, 3 M. & S. 260.

adopting and using and making known such change, this is sometimes deeply resented by neighbours, who are slow to follow anything like another's caprice; and it is this difficulty in founding the reputation that has often driven persons to resort to an act of parliament, a royal licence, or a deed enrolled in chancery, all of which are mere superfluous forms and nothing more, yet are deemed useful to precipitate more quickly the general acquiescence of the public in the change. The formality of a deed is indeed nothing more nor less than a solemn representation of a person's wish and intention.

For about 200 years it has been a practice for the Home Secretary, on application of parties, to obtain this royal licence on certain fees being paid; and testators often annex the obtaining of this royal licence as a condition to the enjoyment of property.[1]

When once it is satisfactorily shown that a new name has been permanently adopted, courts will give effect to it; and so far as it is useful they are sometimes required by parties to do so. Thus if a solicitor change his name, the High Court will order the roll to be amended accordingly.[2] And where a justice of the peace changes his name, the Lord Chancellor will alter the commission of the peace accordingly.[3] The reason of this usage can be no other than this, that if the change of name adds to a man's happiness or is of vital importance in his eyes, does no harm to others, and is obviously not used as a means of fraud, it is right that all official authorities should respect this resolution and give effect to it in every legitimate way.

Restrictions as to food.—One can scarcely imagine on what ground the law could ever have interfered with a matter so exclusively the affair of the individual person as the eating of food; and though the case of paupers and prisoners is as exceptional as that of a beleaguered garrison, their food being supplied at the expense of third parties, who naturally begrudge and stint it, the liberty of the

[1] Per Sir G. Grey; Hans. P. Deb., Sess. 1863. A stamp duty is payable for royal licence of fifty pounds if under a will, of ten pounds if a voluntary application.

[2] Ex p. Daggett, 1 L. M. & P. 1; Ex p. James, 9 C. B. 221, 5 Exch. 310; Ex p. Dearden, 5 Exch. 740. [3] Re Herbert of Clytha, Parl. Pap. 96 (Sess. 1863). See Falconer on Surnames.

rest of the community in this matter can scarcely in any contingency legitimately provoke legislative interference. But this view was not always taken, though it is equally true, that some collateral object, such as repressing luxury, or supporting religion, or helping to maintain some industry has generally been the ostensible motive of so minute a control over one's personal tastes. And ancient states seem usually to have professed some kindred object for this kind of legislation.[1]

Our own legislature had also for centuries very decided opinions as to the food that ought to be allowed. An ordinance of Edward III., in 1336, prohibited any man having more than two courses at any meal. Each mess was to have only two sorts of victuals, and it was prescribed how far one could mix sauce with his pottage, except on certain feast days, when three courses at most were allowable.[2] The Statute of Diet of 1363 enjoined, that servants of lords should have once a day flesh or fish, and remnants of milk, butter, and cheese; and above all, ploughmen were to eat moderately.[3] And the proclamations of Edward IV. and Henry VIII. used to restrain excess in eating and drinking. All previous statutes as to abstaining from

[1] The Licinian law limited the quantity of meat to be used.—5 *Univ. Hist.* 12. The Orcian law limited the expense of a private entertainment and the number of guests (temp. Cato). And for like reasons the censors degraded a senator because ten pounds' weight of silver plate was found in his house.—*Aul. Gell.* b. iv. c. 8; *Val. Max.* b. ii. c. 9. Julius Cæsar attempted to reform the Roman people by the rigour of his sumptuary laws. He restrained certain classes from using litters, embroidered robes and jewels, limited the extent of feasts, and enabled his bailiffs to break into the houses of rich citizens and snatch the forbidden meats from off the tables. And we are told that the markets swarmed with informers, who profited by proving the guilt of all who bought and sold there.—*Suet. in Jul.* So in Carthage, a law was passed to restrain the exorbitant expenses of marriage feasts, it having been found that the great Hanno took occasion of his daughter's marriage to feast and corrupt the senate and the populace, and gained them over to his designs.—*Justin.* b. xxi.

The Vhennic Court established by Charlemagne in Westphalia put every Saxon to death who broke his fast during Lent.—*Volt. Becc.* c. 13. James II. of Arragon, in 1234, ordained that his subjects should not have more than two dishes, and each dressed in one way only, unless it was game of his own killing.—*Montesq.* b. vii. c. 5.

[2] 10 Ed. III. St. 3. [3] 37 Ed. III. c 1.

meat and fasting were repealed in the time of Edward VI.; but by new enactments, and in order that fishermen may live, all persons were bound under a penalty not to eat flesh on Fridays or Saturdays, or in Lent, the old and the sick excepted.[1] The penalty in Queen Elizabeth's time was no less than three pounds or three months' imprisonment; but it was at the same time added, that, whoever preached or taught, that eating of fish was of necessity for the saving of the soul of man, or was the service of God, was to be punished as a spreader of false news.[2] And care was taken to announce, that the eating of fish was enforced, not out of superstition, but solely out of respect to the increase of fishermen and mariners.[3] The exemption of the sick from these penalties was abolished by James I., and justices were authorised to enter victualling houses and search for and forfeit the meat found there.[4] All these preposterous enactments have been swept away in the reign of Victoria.

Restrictions as to dress.—Of all the petty subjects attracting the cognisance of the law none seems to have given more trouble to the ancient and mediæval legislatures than that of dress. And this seems to have been mainly due to the confusion of ideas, the ignorance of trade, and of the elementary axioms of political economy, as well as of the province of the law itself, bearing on that subject. Subsequent experience and reflection have shown the folly and impotence of legislatures attempting to meddle with matters which are as unstable as water, and as irresistible as the tide. Yet views of morality, of repressing luxury and vice, of benefiting manufactures, of keeping all degrees of mankind in their proper places, have induced the legislature to interfere, where interference, in order to be thorough, would require to be as endless as it would be objectless. But as our own legislature was not behind its neighbours in this attempt to control what satirists and wits can do much better, it is useful to look back on some of these graver follies of the past.[5]

[1] 2 & 3 Ed. VI. c. 19. [2] 5 Eliz. c. 5. [3] Ib. §§ 15, 37.
[4] 1 Jas. I. c. 29.
[5] Solon prohibited women going out of the town with more than three dresses.—*Plut. Solon.* Zaleucus is said to have invented an ingenious method of circuitously putting down what he thought bad habits, namely, by prohibiting things with an exception, so that the

The views and objects of our legislature as to the general subject of dress, however preposterous in our eyes,

exception should, in the guise of an exemption, really carry the sting and operate as a deterrent. Thus, he forbade a woman to have more than one maid unless when she was drunk; he forbade her to wear jewels or embroidered robes, or go abroad at night, except she was a prostitute; he forbade all but panders to wear gold rings or fine cloth. And it was said he succeeded admirably in this legislation.—*Diod. Sic.* xii. 20. The Spartans had such a contempt for cowards, that those who fled in battle were compelled to wear a low dress of patches and shape, and moreover to wear a long beard half shaved, so that anyone meeting them might give them a stroke.—*Plut. Ages.* The Oppian law at Rome restricted women in their dress and extravagance.—*Tacit Ann.* b. iii. c. 33. And the Roman knights had the privilege of wearing a gold ring.—*Suet. Jul. Ces.* The ancient Babylonians held it to be indecent to wear a walking-stick without an apple, a rose, or an eagle engraved on the top of it. —*Herod.* b. i. The first Inca of Peru is said to have made himself popular by allowing his people to wear ear-rings—a distinction formerly confined to the royal family.—14 *Univ. Hist.* 377. By the code of China the dress of the people was subject to minute regulation, and any transgression was punished with fifty blows of the bamboo. —*Staunton's Code*, 185. And he who omitted to go into mourning on the death of a relation, or laid it aside too soon, was similarly punished. Don Edward of Portugal, in 1434, passed a law to suppress luxury in dress and diet, and with his nobles set an example.—8 *Univ. Mod. Hist.* 432. In Florence a like law was passed in 1471. And in Venice laws regulated nearly all the expenses of families, in table, clothes, gaming, and travelling.—10 *Univ. Mod. Hist.* 276. A law of the Muscovites obliged the people to crop their beards and shorten their clothes.—*Montesq.* b. xix. c. 14. In Zürich a law prohibited all except strangers to use carriages; and in Basle no citizen or inhabitant was allowed to have a servant behind his carriage.—5 *Pink. Voy.* 666, 696. About 1294, Philip the Fair of France by edict ordered how many suits of clothes, and at what price, and how many dishes at table should be allowed, and that no woman should keep a cur.— 3 *Guizot*, *Civ. Fr.* Lect. 15.

The Irish laws, fifteen centuries before Christ, regulated the dress, and even its colours, according to the rank and station of the wearer. —3 *O'Curry*, 31. And the Brehon laws forbade men to wear brooches so long as to project and be dangerous to those passing near.— 3 *O'Curry*, 163. In Scotland a statute enacted that women should not come to kirk or market with their faces covered; and that they should dress according to their estate.—Jas. II. 1457. In the City of London, in the thirteenth century, women were not allowed to wear, in the highway or at market, a hood furred with other than lamb-skin or rabbit-skin.—*Ril. Mem. Lond.* 20. In the middle ages it was not unfrequent to compel prostitutes to wear a particular dress, so that they might not be mistaken for other women. And

were grave and serious enough. The legislature was so confident of its ground that it recited that "wearing inordinate and excessive apparel was a displeasure to God, was an impoverishing of the realm and enriching other strange realms and countries, to the final destruction of the husbandry of this realm, and leading to robberies."[1] The real object was no doubt the encouragement of native industry, according to the then current notions of encouragement, and, probably, also to carry out a view which has always prevailed, that of keeping people in their proper places. None were to wear foreign cloth, and none under a certain income were to wear furs on their clothes on pain of forfeiture.[2] The Statute of Diet and Apparel in 1363, and later statutes, minutely fixed the proper dress for all classes, according to their estate, and the price they were to pay; handicraftsmen were not to wear clothes valued above forty shillings, and their families not to wear silk, fur, or silk velvet; and so with gentlemen and esquires, merchants, knights, and clergy, according to gradations. Ploughmen were to wear a blanket and a linen girdle.[3] No female belonging to the family of a servant in husbandry was to wear a girdle garnished with silver.[4] Every person beneath a lord was to wear a jacket reaching his knees, and none but a lord was to wear pikes to his shoes exceeding two inches.[5] Nobody but a member of the royal family was to wear cloth of gold or purple silk, and none under a knight to wear velvet, damask, or satin, or foreign wool, or fur of sable.[6] It is true, notwithstanding all these restrictions, that a licence of the king enabled the licensee to wear anything.[7] For one whose income was under twenty pounds to wear silk in his nightcap was to incur three months' imprisonment, or a fine of ten pounds a day.[8] And all above the age of six, except ladies and gentlemen, were bound to wear on the Sabbath day a cap of knitted wool.[9]

These statutes of apparel were not repealed till the reign of James I.[10]

this was the law in the City of London, as appears from records of 1351 and 1382.—*Riley*, *Mem. Lond.* 266, 458.

[1] 3 Ed. IV. c. 5 (1463); 1 Hen. VIII. c. 14. [2] 11 Ed. III. c. 2, 4. [3] 37 Ed. III. [4] 3 Ed. IV. c. 5. [5] Ibid. (1463); 22 Ed. IV. c. 1 (1482). [6] 22 Ed. IV. c. 1. [7] 1 Hen. VIII. c. 14; 6 Hen. VIII. c. 1. [8] 1 & 2 Ph. & M. c. 2. [9] 13 Eliz. c. 19. [10] 1 Jas. I.

Compulsory change of dress.—Sometimes, though rarely, a legislature has gone the length of suddenly compelling an entire change of dress among a people, for reasons at the time thought urgent.[1]

Men wearing women's clothes.—There has also been some trouble occasioned in the law by attempts of one sex to wear the clothes usually worn by the other sex.[2] Though it is not in our law an offence punishable, *per se*, in any way for one sex to wear the clothes usually worn by the other, yet it is often a material ingredient in the consideration, whether this act has not been the means used in order to commit some specific offence. And the circumstances, under which the wearing of clothes of the opposite sex occurs, supply the key to this inquiry. To wear such clothes at a masquerade, or theatre, or place of decorous entertainment, is not, in any sense, punishable, since the circumstances usually negative all but an innocent or harmless intent. But where a male puts on female attire, or a female puts on male attire, in order to obtain facilities for closer companionship, unless indeed very peculiar circumstances combine to negative ulterior objects, this will

[1] In China a law was passed to compel the Tartars to wear Chinese clothes, and to compel the Chinese to cut their hair, with a view to unite the two races. And it was said there were many who preferred martyrdom to obedience.—7 *Pink. Voy.* 175.

So late as 1746 a statute was passed to punish with six months' imprisonment, and on a second offence with seven years' transportation, the Scottish Highlanders, men or boys, who wore their national costume or a tartan plaid, it being conceived to be closely associated with a rebellious disposition. After thirty-six years however the statute was repealed. While the act was in force, it was evaded by people carrying the clothes in a bag over their shoulder. The prohibition was hateful to all, as impeding their agility in scaling the craggy steeps of their native fastnesses. In 1748 the punishment assigned by the act of 1746, 19 George II. c. 39, was changed into compulsory service in the army.—21 Geo. II. c. 34.

[2] PLATO says it is one of the unwritten laws of nature, that a man shall not go naked into the market-place, or wear woman's clothes.—*Diog. Laert.* b. iii. Plato. The Mosaic law forbade men to wear women's clothes, which was thought to be a mode of discountenancing the Assyrian rites of Venus.—*Deut.* xxii. 5.] The early Christians following a passage of St. Paul (1 Cor. xi.) and also one in Deut. xxii. 5, treated the practice of men and women wearing each other's clothes as confounding the order of nature, and as liable to the heavy censure of anathema.—*Conc. Gangren.* Can. 13, 17.

readily be seized upon as a suspicious symptom, and is easily convertible in the minds of a jury into evidence of an attempt to incite to the commission of some specific offence. And the courts hold, that an attempt or solicitation to commit an infamous crime is itself an indictable misdemeanour. And an attempt to commit a felony or a misdemeanour is also a misdemeanour.[1] And it has moreover been held, that such attempt is a misdemeanour, whether the principal offence is a misdemeanour at common law or created by statute.[2]

Painting the face.—There was formerly a rigorous punishment of persons poaching game with blackened faces. Those who hunted in forests with their faces disguised were declared to be felons.[3] And as disguises led to crime, and mummers often were pretenders, all who assumed disguise or visors as mummers, and attempted to enter houses or committed assaults in highways, were liable to be arrested and committed to prison for three months without bail.[4] Even Bacon said he wondered there was no penal law against painting the face;[5] but he seemed still to believe in sumptuary laws.[6] No occasion now remains for punishing the practice of blackening or painting the face, though in relation to the practices of night poachers and burglars it is no uncommon expedient in their precautions against detection. But though nothing now turns on this circumstance alone, yet it seldom fails to assist a jury in discovering from the accompanying facts the motives and intentions of those who resort to it.

Compulsory duty as to arms.—However essential it may be in an organised and settled society to keep part of its subjects in a condition to be ready for war, and to maintain a standing army as the only effectual means of attaining that condition, the difficulty is great in defining,

[1] R. v Higgins, 2 East, 21; R. v Phillips, 6 East, 464. [2] R. v Roderick, 7 C. & P. 795; R. v Butler, 6 C. & P. 368. [3] 1 Hen. VII. c. 8.

[4] 3 Hen. VIII. c. 9. The Mosaic law prohibited the practice of using *alhenna*, or putting an indelible colour on the skin, as was done on occasions of mourning, or in remembrance of the dead, or in honour of some idol.—*Levit.* xix. 28. And two fashions of wearing the beard and hair were prohibited, as has been supposed, on account of idolatrous associations.—*Lev.* xix. 27.

[5] De Augm. b. iv. [6] Bac. Ess. 15.

how far it shall be compulsory on any one of the citizens to take a share in this essential duty—who is to determine—by whom, and when, and on what terms the service is to be rendered—or on what conditions exemption may be procured, if service is allowed in any case to be avoided. Most of these considerations, and the best mode of overcoming them, are part of the duty of government, and are essentially interwoven with its main functions. With these it is at present no part of our subject to deal. But it may for the moment be assumed, that some citizens must necessarily be found, willingly or unwillingly, to forsake all other business and adhere to the temporary profession of soldiers. The main point at present is to state, how far compulsion is used to force any citizen into this profession against his will, for on this subject all legislatures and laws have differed from time to time. And there is also another question of kindred nature, namely, how far every individual is bound to have arms in his possession ready for emergencies, and on the other hand how far he is prohibited from possessing and carrying about such arms.

Compulsory keeping of armour.—Our ancient laws seem to have contemplated a necessity and duty in each citizen to be ready on an emergency to assist in war. Every man was bound to have certain armour in his house, such as swords, knives, bows and arrows, according to his estate; and a regular inquisition was made twice a year, to see that all had these essential guarantees for keeping the peace, and those who had them not were to be fined.[1] At the same time no man was held bound to go out of his shire, unless a strong enemy suddenly came.[2] The legislature in the time of Henry VIII. recited that our ancestors "with the long bow did notable acts and discomfitures of war against the infidels and others, subdued regions, and operated to the terrible dread and fear of all strange nations."[3] Accordingly all persons under sixty, except priests and judges, were bound to keep a long bow and arrows in their houses ready continually to exercise in shooting. Fathers and governors of children were bound to bring up those of a tender age in the knowledge of shooting. Every youth of seven to fourteen was to be pro-

[1] 13 Ed. I. St. Wint. c. 26. [2] 1 Ed. III. st. 2, c. 5.
[3] 33 Hen. VIII. c. 9.

vided by his parent with a long bow. Each male servant of the same age was to be also provided, and the expense to be deducted from wages. Every town and city was to have a butt for shooting at. Justices of assize and of the peace were charged to inquire and fine those who disobeyed the statute.[1] While the long bow was praised, the possession of the cross bow, being an implement used for deer killing, was prohibited, unless with the king's licence, or unless the owner was a lord.[2] At length cross bows and hand-guns were allowed to be used by all persons having 100*l.* a year in lands; or living within seven miles of the sea or the Scottish border.[3] And at a later period persons, having five pounds a year, were bound to keep a coat of mail, a halbert, a long bow, arrows, and steel cap.[4]

Right of wearing arms.—While the possession of arms was thus enjoined, it was a different thing whether each was to be allowed to carry arms about wherever he went. The wearing of arms was repeatedly forbidden by royal mandate in the time of Edward III., especially at night after curfew;[5] and a penalty was imposed on those who went with them in London either by day or night.[6] But in all countries where personal freedom is valued, however much each individual may rely on legal redress, the right of each to carry arms—and these the best and the sharpest—for his own protection in case of extremity, is a right of nature indelible and irrepressible, and the more it is sought to be repressed the more it will recur. If there is any danger in this right being clung to as a vital condition of personal security and self-defence, there are modes of taking the proper measures to wean subjects from the dangerous indulgence. In order to do so it is above all things necessary to create a confidence in the equality and impartiality and fitness of the laws and their administration; and this cannot be done with reasonable men, unless these have some voice in settling those laws and moulding them to the necessities of the time. As has been shown

[1] 3 Hen. VIII. c. 3; 33 Hen. VIII. c. 9. [2] 19 Hen. VII. c. 4.
[3] 14 & 15 Hen. VIII. c. 7; 25 Hen. VIII. c. 17; 33 Hen. VIII. c. 6.
[4] 4 & 5 Ph. & M. c. 2. [5] Riley's Lib. Alb. Pref. 46.
[6] Lib. Alb. b. iii. p. 3. In Venice it was said to have been once a capital offence to carry arms—a law, which Montesquieu says was contrary to nature.—*Montesq.* b. xxvi. c. 24.

in a previous part of this work,[1] the more the people, by which is meant well-selected representatives of the people, who are governed by the laws, have to do with framing and reforming them from time to time, the nearer they approach to self-made laws, and the more readily and easily they become assimilated to the thoughts and business of daily life; the more eager and satisfied all citizens are to range themselves on the side of the law and give to it their entire confidence. When this condition of things is attained, there is an end to the barbaric habit of clothing oneself in triple coats of mail, and to girding on daggers and loaded arms. Each individual, inspired with this confidence, ceases thereafter to think of anything beyond more peaceful weapons. The processes of courts, the bailiffs, and the peace officers then become to him as ample an escort, as if all the *posse comitatus*, the land and sea forces, were always at his side and waiting on his signal.

It was not to be wondered after the experience of the civil wars, and all that led to them and followed from them, that the champions of our constitutional freedom should have retained in their inventory of personal securities the right of each individual to bear arms. It was put prominently forward in the Bill of Rights, owing to the right of wearing arms having been previously refused to Protestants, while it was allowed to Papists. The Bill of Rights expressly declared, that thenceforth "the subjects which are Protestants may have arms suitable to their conditions, and as allowed by law."[2] Since that time, though the use of arms has been wholly discontinued, and their name almost forgotten for purposes of personal defence, the law remains unimpaired as it was then deliberately settled.

Compulsory service as a soldier.—A duty arising out of this subject of bearing arms, and in some respects a correlative duty, is that of serving the state as a soldier. That some citizens must be found able and willing to serve in that capacity is an axiom of government in modern as well as ancient nations. And how far any one can, against his will, be forced to do this duty is an important feature in every law, and closely touches every man's liberty of action. It was said by a judge in Hampden's case, that

[1] See *ante*, pp. 37, 38. [2] W. & M. Sess. 2, c. 2.

every man was bound in his own person to serve the king for the defence of the realm.[1] And however loose was the early practice, there seems to have been for centuries a vague acquiescence in more or less of compulsion in military service. The tenure of lands in feudal times compelled the holders of knights' fees to give forty days' service each year. The assize of arms enacted by Henry II. compelled each, according to his estate, to find arms. And commissions of array were the occasional means of seeking out men able and ready to obey the call to arms. A statute of Edward III., however, prohibited arbitrary conscription and compulsory pressing of soldiers.[2] A usage had sprung up of pressing soldiers for service, whether in Ireland or foreign expeditions. But the Long Parliament, reciting, that, by the laws of the realm, none of his majesty's subjects ought to be impressed or compelled to go out of his country to serve as a soldier in the wars, except in case of necessity, of the sudden coming in of strange enemies into the kingdom, or except they be otherwise bound by the tenure of their lands and possessions, passed an act authorising the crown to impress for the Irish rebellion.[3] The Long Parliament thus condemned the practice of impressment for the army as a general rule.[4]

[1] 3 St. Tr. 1185.

[2] The laws of Moses, like those of all subsequent legislatures, made it imperative, that all persons able to bear arms, in other words, all males above twenty years of age, should be subject, on emergencies, to give their services as soldiers, against the common enemy.—*Numb.* i. 3–46; xxvi. 2. A few exemptions were allowed, such as those who had built a house, but not yet taken possession; who had planted a vineyard, but not eaten of the produce; who had just married, or were about to marry a wife.—*Deut.* xx. 5, 6, 7; xxiv. 5. Every Athenian between the age of eighteen and sixty was bound to serve in the army. Each Roman *eques* was allowed a horse at the public expense, the orphans and unmarried women contributing funds for the purpose.—1 *Niebh. Hist.* 461. Every freeborn Roman between seventeen and forty-six was liable to serve in the army, and if a defaulter he was liable to stripes or fines, or confiscation of property, or imprisonment, or even to be sold as a slave.—*Smith, Dict.* "Exercitus."

[3] 16 Ch. I. c. 28.

[4] "The commission of array arose out of a confusion of rights and duties. The duty of every man to arm himself for the purpose of defence, and for the maintenance of the public peace, a duty which, in the form of the *fyrd*, lay upon every landowner, and, under the Assize of Arms and Statute of Winchester, on the whole *communa*

By a statute of Anne, justices of the peace were authorised to press as soldiers all who had no lawful trade or sufficient to live upon:[1] and the press laws have generally been defended on the ground, that such legislation is no restriction on liberty, because all are by the law of the land under an obligation to fight the country's battles.[2] Attempts had been sometimes made also to compel imprisoned debtors, to compel paupers and criminals, to serve in the army. And at later dates commissioners were authorised to seize those who had no means to support themselves.[3] The prerogative of pressing soldiers having thus been discontinued, an impressment was authorised by statute, when the American War in 1779 occurred, of all idle and disorderly persons, not following any lawful trade or having some substance sufficient for their maintenance.[4] Since then bounties and the ordinary attractions by enlistment have sufficed as a means of raising sufficient soldiers for emergencies.

Enlistment of soldiers now an ordinary contract.—While impressment of soldiers for the army is now neither legal nor usually authorised even by parliament, the finding and engaging of men has become little else than an ordinary contract of service, which one may accept or refuse at discretion. But as there are some slight peculiarities attending the early stages of enlistment, which bear closely

liberorum, the duty of the sheriff to examine into the efficiency of equipment, as a part of the available strength of the shire, the right of the king to accept a quota from each community to be maintained by the contributions of those who were left at home, an acceptance which had been welcomed by the nation as a relief from general obligations, such duties and rights were of indisputable antiquity and legality. The right of the king to demand the service of labourers and machinists at fair wages, was a part of the system of purveyance, and the impressment adopted by Edward I. was probably a reform rather than an abuse of that right. Yet out of the combination of these three, the assize of arms, the custom of furnishing a *quota*, and the royal right of impressment, sprang the unconstitutional commission of array. This existed in full force in the worst times of Edward II. and Edward III. but dated back to William Rufus. Edward I. paid the wages of his forced levies. Under Edward II. the counties and townships had to pay them."—2 *Stubbs, C. H.* 539; 2 *Hallam Const. H.* 129.

[1] 2 & 3 Anne, c. 13; 6 Parl. Hist. 335. [2] 15 Parl. Hist. 888.
[3] 30 Geo. II. c. 8. [4] 19 Geo. III. c. 10; 20 Parl. Hist. 114.

on personal liberty, it will be proper to notice these at this place.

When a person is enlisted into her majesty's service, he is allowed a period of ninety-six hours, and he is obliged to take at least twenty-four hours to make up his mind, whether he will go on with the engagement or withdraw, and he may within the interval, in presence of a justice, rescind his engagement by repaying his enlistment money and smart money.[1] If he cannot make the payment, he must either be attested or be treated as a rogue and vagabond, and committed for three months to prison.[2] And where an apprentice enlists, concealing his apprenticeship, he can only be reclaimed by the master in certain cases and within a month, on verifying the facts before a magistrate.[3]

Punishment of soldiers deserting.—Though, when a soldier has once entered the service, his subsequent conduct and all the remedies relating to it belong merely to the contract, and flow out of it as naturally as in the case of other contracts, yet there are some peculiarities, both as regards desertion of the service and the arrest and punishment for offences committed during its currency which call for special notice. And on this account alone these points are here introduced, for much of the nature, general duties, and punishments of the military service belong to the head of government, since soldiers are the sinews of war, and war is the business of government alone.

Deserters from the king's service, after being mustered and receiving wages, were declared at one time to be felons,[4] and are in war still liable to be sentenced by court-martial to death or penal servitude. But in a country, where the business of a soldier originates in contract, and much of the life of a soldier is spent in works of peace, life is never forfeited for such an offence. When a soldier deserts, in time of peace, he is liable to be apprehended by any person, and taken before a justice of the peace, who may send him to the head-quarters of his regiment, or keep him in prison till communication is made to the Secretary of State.[5] The

[1] Mutiny Act, 39 & 40 Vic. c. 8, § 44. The smart money is twenty shillings. [2] Ibid. §§ 46, 47. [3] Ibid. 57, 58.
[4] 18 Hen. VI. c. 19. [5] 39 & 40 Vic. c. 8, § 34. The person causing a deserter to be apprehended is entitled to a reward of forty shillings.

fraudulent confession of being a deserter subjects the person to treatment as a rogue and vagabond.[1] And to advise and aid desertion is a misdemeanour.[2] But no one can break open a dwelling-house without a justice's warrant in order to search for a deserter.[3]

Arrest of soldiers for crime or debt.—A soldier has all the ordinary rights and duties of a citizen. While a soldier continues in the army, he is liable to be tried by the ordinary courts, both in civil and criminal matters. But in executing the process of the courts, he is not liable to be taken out of the service of the army, except on a charge of felony or misdemeanour. For these grave crimes he is treated like other citizens, except where the misdemeanour relates to his own particular duties. He may, however, be arrested in respect of a debt exceeding thirty pounds, where an arrest would be otherwise competent. In other cases and matters he cannot be taken away from his duties, and the process of the courts or of justices purporting to do so is altogether void.[4] But in all cases of felony and misdemeanour, or debts above thirty pounds, officers and soldiers are dealt with as if they were ordinary citizens, and for a commanding officer to refuse to deliver up to the civil magistrate an accused person under his command, or to obstruct the course of justice, renders such officer liable to be cashiered from the service.[5]

Peculiar punishments in army—military flogging.—There are certain crimes punishable with death in a soldier or officer, as being of a heinous nature and peculiar to his calling. Such are exciting mutiny or sedition—misbehaviour before the enemy—abandoning or sleeping on his post—holding correspondence with the enemy—deserting the service—striking or disobeying a superior officer—and some others.[6] And the sentence of death, if pronounced, may be commuted by her majesty into penal servitude for five years, or to imprisonment.[7] And it is specially enacted, that no court-martial for any offence committed within the Queen's dominions during a time of peace can sentence any soldier to corporal punishment. Such a punishment may, however, be inflicted on a soldier while on active service, if he is guilty of mutiny, insubordination,

[1] 39 & 40 Vic. c. 8. § 37. [2] Ibid. § 81. [3] Ibid. § 82. [4] Mut. Act, § 40. [5] Ibid. § 76. [6] Ibid. § 15. [7] Ibid. 16.

desertion, drunkenness on duty, disgraceful conduct, or any breach of the Articles of War. When this punishment is lawfully inflicted, it must not exceed fifty lashes.[1]

Marine service on shore, how controlled.—The marines when on shore are subject to rules like those of the army in respect to the matters specified.[2] Corporal punishment is prohibited except during actual service in war, and then limited to fifty lashes.[3] A marine cannot be kept in solitary confinement more than fourteen days at a time, or more than eighty-four days in any one year without equal intervals between.[4]

Militia service how far compulsory.—The great questions of policy, arising out of the relations between the crown, the parliament, and the militia, on which the civil war was said finally to turn,[5] belong to the head of government, and need not be noticed here; but as the theory, on which the militia service is maintained, is described in the Militia Act of 1802 to be, that "a respectable military force, under the command of officers possessing landed property, is essential to the constitution," it is important for all citizens to know how far they are liable to be called upon against their will to take part in this force. If it is a compulsory duty, and such a theory could not be acted out without some compulsion, there must obviously be a mode defined by which part of the inhabitants are singled out from the rest, and withdrawn from all other employments to follow only this; or if it is an occasional and temporary employment, then that occasion and its usual conditions require to be known and considered.

The mode of bringing compulsion to bear for militia purposes is this. The numbers of men to be supplied are assigned to each county by the privy council, and the meetings of lieutenancy, when the occasion arises, can call on the constables to return lists of all the men dwelling in the county, between the ages of eighteen and forty-five.[6] The truthfulness of these lists is secured under heavy penalties. And when the returns have been duly settled, then the names are to be chosen by ballot. The person balloted shall be compelled to serve, subject to this proviso, that, if

[1] Mutiny Act, § 22. See further, *post*, Chap. viii. "Punishment."
[2] Marine Mutiny Act, 39 Vic. c. 9. [3] Ibid. § 27. [4] Ibid. § 36.
[5] 2 Hall. Const. H. 128. [6] 42 Geo. III. c. 90, § 25.

he shall produce a substitute, able and fit, and who shall have not more than one legitimate child, then such substitute shall be accepted. There are some exemptions expressly established, such as peers, those serving in other capacities as soldiers or sailors, clergymen, teachers licensed to teach in separate congregations, and any poor man having more than one legitimate child. And he who has once served is exempted, till his turn in rotation again arrives. He who, when chosen, refuses to serve, is fined ten pounds; and if such sum is not paid, he shall be treated as duly enrolled, and shall be liable to the same punishment as others are for desertion.[1]

While this compulsory service is one of the contingencies to which all men of a certain age are liable, still the occasion of enforcing a ballot with its compulsory levies has been rare, and is seldom again likely to arise, except in case of an invasion by a foreign enemy, or a similar extraordinary urgency. And accordingly the balloting of the militia and the raising of a sufficient domestic force in this way has long been suspended by statute. This Suspension Act has been annually renewed since 1865 as a matter of course.[2]

But while the compulsory part of the militia service has been practically suspended and abolished, there is a voluntary service of the same kind still kept up by means of enlistment. The rule as to enlistment and desertion is the same as that relating to the army.[3] One characteristic of the militiaman's service is, that he cannot be forced against his will to serve in any place out of the United Kingdom, though with such consent he may serve in the Channel Islands, Man, Gibraltar, and Malta.[4] In consideration of the importance of his duty, the militiaman is excused from serving the office of constable, and when a militia officer is appointed sheriff, the under-sheriff is bound to act for him while the militia force is embodied.[5]

Impressment of seamen, how far legal.—Though compulsory service in the army was abandoned in the time of Charles I. as a doctrine and as a practice untenable, except when parliament comes forward in the common interest

[1] 42 Geo. III. c. 90. [2] 28 & 29 Vic. c. 46; 39 & 40, Vic. c. 69. [3] 38 & 39 Vic. c. 69, § 31. [4] Ibid. §§ 49, 50. [5] Ibid. §§ 94, 95.

and passes an act to legalise it during a pressing emergency and no longer—though service in the militia is in its worst form softened by the equality of the ballot, yet as regards the sea service a doctrine has prevailed, which in its gross injustice and inhumanity seems not to be surpassed in the most barbarous countries. This is the doctrine and practice of impressment for the navy, which has often been proudly pointed to as having flourished in England from the earliest times, and as having survived all the assaults of the wisest statesmen and sagacious legislators, and as having been recognised in all the courts for centuries as an unassailable axiom of the common law.[1] Yet this is none other than a practice under which any government of the day, without the least authority from parliament, can, whenever sufficient men are not forthcoming to man her majesty's fleet, authorise any person who has lived a seafaring life to be seized in the street, or wherever he may be found, and carried off at a moment's notice by force, severed from his family and his occupations, and made to fight the country's battles in whatever part of the world the demon of war beckons. It is no wonder that Sir Mathew Decker, in 1756, wrote, that impressment put a free-born British sailor on the footing of a slave.[2] By this practice free men have been entrapped in taverns, or while on board merchant ships, or on leaving churches, by a press-gang (often assisted by a military force), who have committed the grossest outrages on individuals, and whose atrocities have been the terror of country villages and towns, but have been extenuated

[1] Justice FOSTER's elaborate argument, or rather apology, "upon the foot of reason and public utility," for impressment being part of the common law is founded on the essential fallacy, that, because some people have voluntarily chosen the seafaring life, therefore it is less unjust that the crown should seize upon them and make them do the work of defending the country than to seize on any of the other classes who did not choose the seafaring life. He first says, all men are equally liable to serve the country in an emergency, and then concludes that therefore a few of them only ought to be made against their will to serve, and that all the rest should go scot free. What possible difference it can make that some unfortunate people choose the seafaring life, no intelligent person can point out. The strong common sense of Benjamin Franklin, though unlearned in the law, refuted this illogical reasoning with masterly irony.—2 *Franklin's Works*, 331.

[2] Decker on Trade, quoted 2 Parl. Deb. (3rd) 639.

and protected by the courts against all question.[1] It has been held again and again to be sound policy as well as sound law. When, however, in 1859, the subject was maturely examined by a commission, it was agreed that such a system could no longer be successfully enforced.[2]

Authorities as to the law of impressment.—Coke asserted the law to be, that those only were liable to be pressed, who held lands on such a tenure, or who had covenanted so to serve, or who were the king's prisoners.[3] Hale thought the legality of impressment doubtful; at least he expressly said he gave no opinion.[4] Lord Camden said it was wholly illegal. Lord Mansfield admitted that usage alone supported it, and gave no better reason for it than the trite maxim, that private mischief should rather be submitted to than that public detriment and inconvenience should ensue—a maxim which is too vague to challenge either assent, or acquiescence.[5] Lord Chatham's British instincts recoiled from it.[6] Lord Kenyon repeated, that impressment was founded on the common law, but was confined to persons whose employment is on the sea and on navigable rivers.[7]

Sir Mathew Foster is credited with the distinction of being the champion of this anomalous doctrine, and he has refined and strained law (which has on other subjects sometimes been called the perfection of reason) to such an extent, that its best friends can in modern times scarcely recognise it.[8] That impressment had prevailed from the earliest times seems to have been undisputed, and yet this, the leading idea, has carried all before it. Though we know this phrase is but a flourish of rhetoric, and points to an epoch posterior to Tacitus and Cæsar, posterior to Canute and Alfred, wonderful has been the respect to the unknown and unsearchable wisdom it is taken in this instance to indicate and embody. The legality of impressment was again defended by Mr. C. Butler, who had the benefit of former championship, on the following grounds. It is said, that the navy must be supplied with men, because it is essential to the existence of the nation; and

[1] 19 Parl. Hist. 81. [2] Rep. Com. Navy, 1859, p. 11. [3] 1 Inst. 71. [4] 1 Hale, P. C. 678. [5] R. v Tubbs, Cowp. 512. [6] 15 Parl. Hist. 602; 20 Parl. Deb. (3rd) 678. [7] R. v Fox, 5 T. R. 276, 417. [8] Foster, Cr. L. 178; 18 St. Tr. 1323.

that to get men by bounties is extravagantly costly, and impracticable. It is no great hardship to seize seamen and to single them out for a compulsory service, because all law is full of inequalities, and one equality more cannot make much difference. When a seaman is made to serve in the king's ships, it is only slightly varying his own occupation. Besides, it has been the custom in all ages of our history for the admiralty or the crown to authorise seamen, and often landsmen generally, to be seized and impressed; and many statutes expressly refer to the practice as part of the common law. Moreover it must be a right inherent in every government to call on particular citizens to act for the public interest as they may be required.[1] Such is the apology offered.

Essential injustice of impressment.—That many nations, especially ancient and mediæval nations, have in the desperate turns of fortune resorted to impressment in order to man their ships, should scarcely be deemed a lawful or meritorious origin for any English rule of law. That those who have the power should compel and force those who are at their service to do anything they please, is an axiom of history. But all the wisdom invoked from the

[1] According to Thucydides, the Athenians in an emergency pressed sojourners as well as citizens into their ships.—*Thucyd.* b. iii. In the latter days of the Roman republic force was used to obtain recruits.—*Sallust; Gibbon, Decl. and F.* c. i. In a later age Arcadius and Honorius laid down the rule, that individuals may keep vessels, but must always be at the call of the public—*Cod. Theod.* b. xiii. tit. 7, c. 2. In all periods of Venetian history, on the eve of war, it was the practice for the government to arrest merchant ships and all hands on board, and use them for the public service.

Danegelt was a tax of one shilling on every one in the kingdom to fight or buy off the Danes.—*Chron. Sax.* 136. Domesday Book mentions places bound to find the king with seamen and materials for ships.—*Seld. Mar. Cl.* The merchants of the Cinque Ports were bound to find and equip at their own expense a certain number of ships.—4 *Inst.* As early as the reign of Edward I. the admiralty had powers conferred by writ to compel merchants and mariners to find and serve in ships.—*Bac. on Gov.* pt. ii.; *Scobell, Coll.*; 2 *Stubbs, C. H.* 288. From the reign of John orders used to be issued by the crown to arrest all ships and men, and the public service was treated as paramount. And express authority by statute has sometimes been conferred on the lord admiral to impress various classes of persons for the navy.—16 Ch. I. c. 5; 16 Ch. I. c. 23, § 26.

precedents of the admiralty, from the common law, from the legislature, from the practice of other nations, ancient and modern, can never extenuate the essential injustice and tyranny of seizing on one class of men and making them slaves to all the rest. This is the more conspicuously unjust when a legislature exists, which can at all times intervene, and exists for no other purpose but to meet and deliberate when and how best to prevent one class of citizens from being oppressed for the good of the rest.[1] The assumption, that impressment is the only efficient mode of manning the navy in an emergency is, on the most cursory reflection, baseless, though it is the kind of plea which absolute power has resorted to in all ages. It is only in disguise the old objection, that impressment is the cheapest remedy. In any supreme crisis, when a nation is like a beleaguered garrison, the resource of the ballot is always at hand, and the whole property of all the inhabitants, to the last acre and to the last shilling, is also available in order to supply the sinews of war; and whatever be the price which liberty may require, that price must be paid. But it is parliament and parliament alone which can act as the great pacificator, through whose mediation the resources of the country can be made without injustice and without invidiousness to minister to the common good of all. By this medium alone can jarring interests and duties be reconciled. It is the manner and nothing but the manner in which the painful operation is performed, that softens the sharpest pangs, that makes the bitter sweet, and takes all the sting out of oppression.

[1] In 1779 parliament in three days passed an act to suspend all exemptions from impressment into the navy, together with the right of those impressed to sue out a writ of *habeas corpus* for their liberation. —20 *Parl. Hist.* 962. Mr. ATTORNEY-GENERAL RYDER, in the House of Commons in 1741, after enlarging on the maxim, that the safety of the state is the supreme law, ended by saying that by any other plan than impressment "you will have a much less powerful navy at a much greater cost to the state."—12 *Parl. Hist.* 26. LORD MANSFIELD, while using the stereotyped arguments in favour of impressment, is careful to add, that "a pressed sailor is not a slave; no compulsion can be put upon him except to serve his country."—R. *v* Tubbs, Cowp. 512. The same learned judge, however, says, "to suppose the usage extends to private gentlemen amusing themselves with yachts, &c, is absurd."

Though therefore it has been too easily, and perhaps beyond recall, laid down by the courts, that impressment of seafaring men is lawful by the common law, it will be difficult for a nation with a strict regard to liberty, and above all for one which has waged so many successful battles for liberty, to approve of such a law being again enforced. It would have been wiser not to have thus frittered away the rule of Magna Charta, that no free man shall be disseised of his liberties, or exiled, but by lawful judgment of his peers or by the law of the land.[1]

Compulsory office of juror.—The office of juror stands on the footing of being essential to the correct administration of justice. The mode of ascertaining facts depending on the credibility of witnesses, and involving the guilt or liability of parties, has been found by experience to be the best, when impartial men, selected almost at random from the crowd, undertake it. If these men, after hearing all that can be said on both sides, and having balanced opposing accounts under the guidance of the judge, arrive at a conclusion, this, when accepted, may well be followed up by the law with all the consequences assigned to such facts. If the service of a juror were not therefore made compulsory, justice would often stand still, and guilt and disobedience would fail to be satisfactorily detected and punished. The antiquity of this peculiar public function, and the successive changes through which it has passed, as well as its apt performance in varied departments of the law, belong to the subject of Judicature; but as it is a compulsory duty, and to some extent interferes with the occupations of nearly all classes of society, part of it falls properly within that division of the law relating to the security of the person. Whatever compels one to give up his own business or avocations in order to attend to the business of others, not originating in his own contract or voluntary undertaking, must be borne in mind, when it is sought to comprehend how much of liberty is enjoyed, or

[1] 2 Inst. 47; 1 St. Tr. Pref. xxvii. Impressment was the ostensible cause of war between Great Britain and the United States of America in 1812, when it was said all the Governments of Europe maintained such a right. The American secretary stated that in 1806, during the European wars, 2,273 seamen were impressed in England.—*Wikoff*, *Civ.*

how beneficial are the occasions, and how useful the ends, for which part of that liberty is taken away. In this instance the gain so far surpasses the loss, that none can fail to feel, that it is infinitely better to be subject to this occasional interruption of personal freedom, in order that, when the time comes, his own may be more safely defended at the hands of his neighbours.

Jurors divided into two classes—common and special.—There are two kinds of jurors known to the law, namely, common and special jurors. The latter are selected from the whole class, partly on account of their higher station in society, and the intelligence and liberality which accompany that station, and are reserved for special duty, a duty, however, which is solely performed in civil suits. The common jurors are those who dispose of all criminal charges, whether these are made before the grand jury or the petty jury: and they also dispose of a large proportion of issues in civil suits. And one characteristic which at present distinguishes the one class from the other is, that while the common jurors are not paid, a small fee is paid to the special jurors, who are moreover, as already stated, used only in civil actions.

Qualification and attendance of jurors.—The qualification of jurors has varied from time to time, and the Bill of Rights allowed none but freeholders so to act in indictments for high treason. In general now all persons between the ages of twenty-one and sixty are liable to serve as jurors. The qualification for a common juror is that of being an owner of freehold estate of ten pounds a year, or a leasehold of twenty pounds, or being a householder rated at twenty pounds, or in Middlesex at thirty pounds.[1] In boroughs all burgesses are qualified.[2] But there are many exemptions set forth in the statutes, as peers, clergymen, lawyers, doctors of medicine.[3] The qualification of special jurors is the occupation of a house of fifty pounds in large towns, and 100*l.* elsewhere, or, being a banker or merchant, or entitled to be called esquire.[4] The

[1] 6 Geo. IV. c. 50, § 1; 33 & 34 Vic. c. 77, § 7. [2] 5 & 6 Will. IV. c. 76, § 121.

[3] 33 & 34 Vic. c. 77. Aliens, after ten years' residence, are qualified.—33 & 34 Vic. c. 77, § 8. Convicted felons are inadmissible.—6 Geo. IV. c. 50, § 3; 33 & 34 Vic. c. 77, § 10. [4] Ibid. § 6.

duty of preparing, verifying, and settling the lists of jurors is performed jointly by the clerk of the peace and the overseers, and approved by justices of the peace.[1] And as the duty of juror involves some trouble, there is given to people who wish to avoid it an opportunity to see, that they are not improperly put in the lists, these being freely exposed to public examination beforehand.[2] At the same time all tampering with the officials, in order to leave out the names of persons qualified, is punished by fine.[3] And it is also provided, that no person shall be summoned more than once in any one year.[4]

Punishment of juror for non-attendance.—The punishment imposed on jurors for non-attendance is such a fine as the court thinks fit.[5] But the fine is not enforced for fourteen days, so as to permit of an explanation.[6] And the juror cannot be imprisoned for non-payment, unless his goods on sale by distress fail to yield payment.[7]

Juries kept separate from the parties.—The peculiar duty, which juries are called upon to discharge, requires that they should be as impartial as possible; and hence there is a laudable jealousy shown by the law of anything like tampering with their integrity. For this end an opportunity is denied to either of the contending suitors to obtain any access to them, whenever they have once taken upon themselves the function of judging. This object requiring that there should be no communication allowed between the jury and the parties, the jury are kept in a separate part of the court, and as much as possible unapproachable, from the beginning to the end of a trial. Coke said, that, after the evidence is given on the issue, the jury ought to be kept together in some convenient place, without meat, fire, or candle, and without speech with any, unless it be the bailiff; and with him only, if they be agreed.[8] Hence the jury are kept by themselves, and a bailiff is

[1] 6 Geo. IV. c. 50, § 5; 25 & 26 Vic. c. 107; 33 & 34 Vic. c. 77.
[2] 33 & 34 Vic. c. 77. [3] 6 Geo. IV. c. 50, § 43. [4] 33 & 34 Vic. c. 77, § 19.

[5] 6 Geo. IV. c. 50, § 38. If the juror was one who was present at a view, the least fine is ten pounds. The fine for not attending a coroner or sheriff is not to exceed five pounds.—Ibid. § 53.

[6] 25 & 26 Vic. c. 107, § 12. The party fined must, in six days after notice, make his excuse, if any. [7] 22 & 23 Vic. c. 21, § 32; 3 Geo. IV. c. 46; 4 Geo. IV. c. 37. [8] 1 Inst. 227.

sworn to keep them together.[1] And on these occasions the ancient law dealt somewhat harshly with these public servants. There can be no reason for keeping the jury from eating, far less from fire and light, as to do so would only tend to lead them to neglect their duty; and all judges arrange the sittings of the jury, with a view to the requirements of nature, and no longer look with jealousy on any trifling indulgence, as if it were a point to render their duty disagreeable and irksome.[2] It has been said, indeed, that if the jury are treated with meat or other entertainment by one of the parties, before they agree on their verdict, and they give their verdict for him, such verdict will be void; though it would be otherwise if their verdict had previously been agreed to.[3] But juries can scarcely in modern times, be presumed to decide according as one or other of the parties treated them to refreshment, though the scandal of such an incident should be scrupulously avoided.[4]

[1] 2 Hale, P. C. 296; R. v Stone, 6 T. R. 527. [2] 1 Inst.

[3] 1 Inst. 227, Everett v Youalls, 4 B. & Ad. 681.

[4] In one case, 30 Elizabeth, it is related, that the jury retired to deliberate, and remaining a long time without concluding anything, "the officers of the court, seeing this delay, searched the jurors, if they had anything about them to eat, upon which search it was found that some of them had figs, and others pippins; for which the next day the matter was moved to the court, and the jurors were examined upon it upon oath. And two of them did confess that they had eaten figs. Three others said they had pippins, but did not eat them. Those who had eaten were each fined five pounds." It was, however, decided that the verdict was not void, as the eating was at the expense of the jury themselves, and not of the party.—Mounson v West, 1 Leon. 133; R. v Burdett, 12 Mod. 111. It seemed almost a rule, that if the jury ate at the expense of the party, and gave a verdict for him, it was bad; but if against him it was good.—*Jenk.* 187; *Dyer*, 237. The Welsh statute of 1534, 26 Henry VIII. c. 4, enjoined that jurors in Wales should not, without leave of the court, be permitted to have either meat or drink, thereby assuming that no judge would think of denying this want of nature, if shown to be reasonable in the circumstances. In a case in 1758, where the officer refused to let the jury have candles, Lord Mansfield thought it necessary first to ask, if either of the parties objected. Fortunately neither did object.—R. v Hensey, 1 Burr. 647.

It was said to have been a custom at one time for the successful party to entertain the jury.—*Smith's Com.; Fortesc.* (*Amos*) 98. In a case in 1649, the jury asked, that they might have a cup of sack, but were told that they could not have it in felony or treason cases, though in other

It has sometimes been asked what authority there is for allowing food to a jury during their deliberations; but it is so obvious a right, that some authority of a statute, and of the clearest kind, would be required to take it away. Law cannot presume to suppress the appetites of ordinary men who are not criminals. Whatever may have been the notions of duty in former times, no rule can now be laid down or accepted, that the performance of a juryman's duty, or of any other judicial function, is incompatible with such moderate food as each may reasonably require; and as to the necessity and quantity of it, nobody but the juror can with safety dictate. The discretion of the court may be brought to bear as to anything beyond a certain minimum, but if a juryman represented that according to his constitution and habits food was necessary, it would only defeat justice, if not bring it into contempt, should the request be denied. Starvation is much more likely to derange than fortify or quicken the judgment; and the sole duty of a juror is to give his attention and the best of his consideration to the matter in hand, but nothing more. No rule of law requires that his duty shall be made vexatious, if not dangerous to health.[1]

Juries during adjournments.—If a civil trial last from day to day, the jury at the end of each day are allowed to return to their homes for the night. But in criminal trials, where the issue is generally more momentous, it is usual for the jury not to separate, but to remain together, or at least in private, and not to return to their homes, lest by communicating with third parties they should receive a bias.[2] In such cases the court has an inherent

cases they had been permitted to drink before they went from the bar. —4 *St. Tr.* 1404. And old authorities seem to assume as a first principle, that juries ought to be debarred from all food during the stage when they retire to deliberate on their verdict.—*Doct. & Stud.* 271; Mounson *v* West, 1 Leon. 133; 3 C. & K. 90 (n.); Jenkyns, R. 187. This practice of so jealously watching the food of jurors may be derived from the old practice of champions before the battle taking oath that they had neither eaten nor drunk anything "whereby the truth might be disturbed and the power of the devil enhanced."—*Mirror*, c. 3, § 25; 2 *Inst.* 247.

[1] See Windsor *v* R. L. R., 1 Q. B. 390; 8 B. & S. 490. [2] Langhorne's Case, 7 How. St. Tr. 497; Hardy's Case, 24 How. St. Tr. 414, 572.

power to adjourn, but the jury are meanwhile secluded from the public, and are often kept together in a hotel.[1]

How far juries must be unanimous.—As unanimity on the part of the jurors, in both civil and criminal cases, is one of the objects aimed at by the law, and the business cannot be completed until such a result of their deliberations is attained, it is obvious that whatever compulsion is exercised must continue until their views coincide. It may well be considered somewhat extraordinary, that twelve men, taken, as it were, by accident out of the crowd, should be expected, after a brief examination of statements and witnesses, not only to agree, but should be to some degree concussed into such agreement by confinement and deprivation of the comforts of their homes.[2] In any other business of life it would be vain to expect such agreement; nor indeed would any prudent man take the trouble to consult, and run the risk and delay of refraining to act, except on the unanimous view of so many minds. And it may be asked, why should the law attribute such importance to a unanimous view, and refuse to acknowledge or give the least weight to any conclusion of less than the whole of the men selected to act as jurors, seeing that it must be obvious that there is no power of compelling the minds of men accustomed to think for themselves to accept a view which may appear to them unfounded or contrary to truth. Yet much can be said in favour of the doctrine acted upon by the law, that unless the whole of the jurors shall agree, their verdict shall go for nothing. It would indeed be preposterous that free men, empanelled to decide according to the truth, should be punished for not acquiescing, or should be detained and

[1] 25 St. Tr. 132, 745, 1295.

[2] This rule of unanimity applies to all cases, except grand jurors and jurors at a coroner's inquest. A grand jury consists of twelve to twenty-three persons, and at least twelve must agree in their finding. A coroner's jury consists of more than twelve, and at least twelve must agree. In county courts, where the jury consists of five, they must be unanimous. It was thought that in ancient times the judge attained unanimity by dismissing the minority and substituting new jurors.—*Glanv.* b. ii. c. 17; *Bract.* b, iv. c. 19; *Fleta*, 230. And even sometimes the verdict of the majority was accepted.—2 *Hale, P. C.* 297. But in the time of Edward III. it was settled, that a verdict of less than twelve persons was nugatory.—41 *Ass.* 11.

imprisoned until their wills were subdued to one level—till the obstinate or the sensible part should starve the rest into a surrender of their reason. But so long as a reasonable attempt only at unanimity is enforced, and nothing like tyrannical coercion or the rack is employed, the propriety of insisting on having the opinion of all or none is capable of being supported, and for the following reasons.

No jury is ever left to spell their way through difficult and obscure passages of evidence or law. A judge is always at hand to explain anything embarrassing, to collect the scattered rays of evidence, and point them to one or two precise issues; and all that the jury have to do is to weigh in their own minds the alternative statements, and say which of them is more correct. When they agree, a reasonable confidence is felt, that all other persons would agree; and when they differ, it may with equal reason be assumed that the point submitted to them is so obscure, so delicate, and so ambiguous, that persons equally sensible would take opposite sides, and would stand by their respective views against all comers, unassailable to all the reasoning and all the argument of all the rest of the world. Considering how solid and intense is the satisfaction, not only to bystanders, but to the parties involved, at this mode of finding guilt or liability—when twelve persons having no interest one way or the other, having heard everything that can be proved or argued on one side and the other, unanimously agree in one view—and how much feebler and less weighty is the judgment of one mind only, however upright and sensible, the result of unanimity is well worth aiming at in all cases. If there are occasional instances in which the jury act perversely or obtusely, they are at least more prone to be humane than a single judge would be, and their dissension may thus be attributed to the weaknesses inherent in human nature itself. And hence the best and least likely to err of all tribunals as yet known among men is that of twelve, or at least several, associated and impartial individuals, to whom is submitted the guilt or innocence, the liability or non-liability, in dispute.

In early times the court seems to have shown little consideration to those juries who could not conscientiously

agree in a verdict, treating their differences as the result of obstinacy, which a little hard usage might overcome. Hence it has been said, that if the jurors could not agree in a verdict before the judges of assize left the town, they might be taken in a cart by the sheriff to the borders of the county, so as to give them the benefit of this additional time to stimulate reflection, and their verdict might be accepted by the judge in a different county; though this travelling has sometimes been treated as an idle invention.[1] Yet as it is impossible to compel a jury to agree, and equally impossible to detain them for ever if there is no prospect of their ever agreeing, all that the court can do is to allow a reasonable time for the jury to make up their minds, and if then they cannot agree, to discharge them and treat the trial as abortive. No rule can be laid down as to the circumstances which will justify their discharge on the ground of disagreement. It is always a matter for the discretion of the judge, and his discretion will not be interfered with by any court of error.[2] It is usual, however, after the lapse of five hours, to come to a decision on this point, for after such a time hunger must interfere with any man's judgment, and discussion must have exhausted its powers.[3] In some countries, as for example in Scotland, a rule has been laid down of allowing the court to accept, after a lapse of three hours, the verdict of nine jurors, and treat it as the verdict of the jury; and in criminal cases the verdict of a majority, namely, eight out of fifteen, will suffice in that country.[4] But in this country no middle course has ever been adopted. The verdict of a majority of a petty jury is not sufficient; and if, after a reasonable time, all the jurors cannot agree, the only course is to discharge them, whether the case is civil or criminal. It is

[1] Tri. per pais, 274, 285; Morris *v* Davis, 3 C. & P. 427; Windsor *v* R., L. R., 1 Q. B. 289, 390. COKE says that some call this treatment of a jury an imprisonment.—*Co.Litt.* 227b. Courts formerly indulged in so many harsh practices in all the departments of the law, that this legend about the cart seems quite consistent with ancient notions of propriety. Hale seems to recognise the practice.—2 *Hale*, 297.

[2] Windsor *v* R., L. R., 1 Q. B. 390.

[3] In Scotland a precise time of six hours is fixed in civil cases, after which, if nine are not unanimous, the jury are discharged, as a matter of course.—22 & 23 Vic. c. 7, § 2.

[4] 22 & 23 Vic. c. 7, § 1.

true, that in a civil case the parties may consent to take the verdict of any portion of the jury; but that is entirely by virtue of the agreement. And it necessarily follows, that, after a jury has been discharged for not agreeing, a fresh trial may be had.[1]

The jury deciding by lot.—The duty of the jury is to apply their minds to the evidence, and endeavour to arrive at a unanimous opinion. Hence it is so utterly contrary to that duty to decide by lot, that the court on being satisfied as to that fact, will not only set aside the verdict, but will fine the jurors.[2] And yet, owing to the evils that would be induced by allowing jurors to give evidence and violate the confidence of their privacy, or connive with parties outside, the court will not listen to any of them seeking to disclose such misconduct. It is added, nevertheless, that if a stranger happen to look through a window, and see the jury casting lots, such evidence will be accepted, and if reasonably credible, will be acted upon.[3]

Accident to juror during trial.—If a juror happen during the trial to become so unwell as to require him to depart, this also has the effect of discharging the rest of the jurors; and renders it necessary to begin the trial *de novo*, either before a new jury, or the other jurors, with a substitute for the absent member. In civil cases, by consent of parties, the original trial may go on either with the reduced number, or with one substituted for him who has withdrawn.[4] And here again, if the discharge of a jury in a criminal trial before giving their verdict occurs, there being nothing in the nature of a trial, the prisoner may be tried again, and is not entitled to his discharge.[5]

How far jurors punishable for misconduct.—As the duty of jurors is compulsory, and at the same time essential to the administration of justice, it is obvious that while their integrity is of vital importance, and may be expected to be secured against suspicion, and some check put on their

[1] Windsor *v* R., L. R., 1 Q. B., 289, 390; 6 B & S. 143, 490. [2] Foy *v* Harder, 3 Keb. 805; R. *v* Fitzwater, 2 Lev. 139; Foster *v* Hawden, Id. 205; Hale *v* Cove, 1 Str. 642. [3] Vaise *v* Delaval, 1 T. R. 11; Owen *v* Warburton, 1 N. R. 326. [4] Edwards' Case, R. & Ry. 224; 3 Camp. 207; 4 Taunt. 309; R. *v* O'Connell, 1 Cox, C. C. 413. [5] Scalbert's Case, 2 Leach, 620; Kinloch's Case, 18 St. Tr. 416.

misconduct, they ought to be also secured against being harassed by the fear of liability for mistakes made in the honest discharge of their duty. As will be seen, the general rule is, that judges of all kinds are free from responsibility for mistakes so made in discharging the judicial office, subject to some qualifications; and it is fitting that the office of juror should also partake of this immunity. One of the dangers indeed arising out of corruption of juries led to the early practice of requiring a qualification by estate, so that they might answer for their misconduct.[1]

The only legal mode of reversing a verdict of a jury known to the common law was by attaint, granted by the statutes of Edward II. and Edward III., the object of which was to rehear the case by means of a jury of twenty-four persons; the law considering that the oath of one jury should not be set aside by an equal number, nor by less than double the former. If the second jury agreed, the verdict was confirmed; if otherwise, the former verdict was annulled, and the first jury were convicted of perjury and false verdict. Fortescue says, that, if a jury be charged with giving a false verdict and twenty-four men of estate so find, then each juror shall be imprisoned, his goods shall be confiscated, his property seized by the king, his houses pulled down, his woods felled, his meadows ploughed up, and himself declared infamous.[2] And this practice of attainting jurors was recognised in many ancient statutes as a proper remedy in the circumstances.[3] The Star Chamber seemed to have taken on itself to commit to the Fleet, and order to be pilloried, jurors who acquitted persons, as it thought, wrongfully.[4] That court justified itself because the ancient remedy of attaint had almost gone into disuse.[5] When the jury acquited Throckmorton in 1554, some of the jurors were sentenced to pay a fine of 2000*l.*[6] And the jury, who acquitted Lilburne in 1653, were summoned before a council of state to answer for their misconduct.[7]

1 15 Hen. VI. c. 5; 16 & 17 Ch. II. c. 3. 2 Fortesc. De Laud. c. 26; 3 Inst. 164; Co. Litt. 294b. 3 1 Ed. III. st. 1, c. 6; 34 Ed. III. c. 8; 11 Hen. VII. c. 24; 19 Hen. VII. c. 3; 23 Hen. VIII. c. 3. 4 Smith's Com. of E. b. iii. c. 1; Burn's Star Ch. 55, 64, 66. 5 2 Hallam, Const. H. 31. 6 1 St. Tr. 901; 2 Strype, 120; Floyd *v* Barker, 12 Rep. 23. 7 5 St. Tr. 445; Penn's Trial, 6 St. Tr. 961.

In Bushell's case, however, in 1670, when the jury refused to find a Quaker preacher guilty of anything but of speaking to the people in Gracechurch Street, which the Recorder of London treated as a contempt of court, and for which he committed them, Edward Bushell, one of the jurors, refusing to pay his fine, and being imprisoned, sued out his *habeas corpus;* and the question was raised, whether a juror was liable to be punished for doing what he considered his duty. Vaughan, C. J., in delivering the judgment of the court on that occasion laid down the law, adhered to ever since, that if a juryman was merely to be told what he was to find, then it was only troublesome delay, great charge, and of no use in determining right and wrong. The juror was held exempt from all punishment.[1] And the function of a juror may now be said to be surrounded with as entire an immunity as that of the highest judges in the land.[2]

The practice of the court granting a new trial in civil cases, whenever a mistake on the part of the jury or the judge has led to a wrong conclusion, has been vindicated as a necessary incident of jury trials.[3] But any action or proceeding against a juror in respect of his conduct as such may be said to be inapplicable, so that his office is inviolable since the decision of Vaughan, C. J., in 1670. The juror has only to consult his own conscience as regards the part he takes in the machinery of justice.[4] On the other hand, the protection of jurors against calumny and libel is jealously guarded, and a criminal information may be filed, or indictment may be laid, against the offender.[5]

[1] Vaugh. 135; 6 St. Tr. 999.

[2] The writ of attaint was formally abolished in 1826, though it had long been obsolete.—Bright *v* Eynon, 1 Burr. 390. But the punishment was reserved for embracery, or corrupt conduct to influence a jury, and for a juror wilfully or corruptly consenting thereto, as such punishment existed before that statute.—6 Geo. IV. c. 50, § 61.

The practice of the court granting a new trial began to be resorted to, and the first instance on record of its use is said to be in 1665, though Lord Mansfield said it was much older.—Bright *v* Eynon, 1 Burr. 290.

[3] Per L. Mansfield, C. J., 1 Burr. 393; Per De Grey, C. J., Fabrigas *v* Mostyn, 20 St. Tr. 175. [4] Johnston *v* Sutton, 1 T. R. 513; Greenvelt *v* Burwell, 1 L. Raym. 469. [5] R. *v* Watson, 2 T. R. 199; R. *v* Hart, 30 St. Tr. 1131; R. *v* Thompson, 8 St. Tr. 1359.

Compulsory duty of a witness.—The duty of every citizen to give evidence in a court of justice may be said to rest on the same footing as that of a juror. It is absolutely necessary to the administration of justice. It may be an accident or a misfortune, that a person should be present in any emergency touching the life or business of another, but, whenever it becomes important to that other that a court, civil or criminal, should investigate some conduct or some event on which any remedy whatever turns, the duty for each and all to be at the call of such court in the interest of truth and justice is all but self-evident. Yet this power of compulsion may reasonably be subjected to considerable qualifications, seeing that after all the procuring of evidence is necessarily a matter exclusively within the breast and subject to the will and almost the caprice of the person claiming or possessing it.[1] Not only is the duty imperative on all persons to attend a court of justice as witnesses, but whoever prevents or obstructs them, or uses threatening language having that effect, is liable to be punished for contempt.[2]

Mode of enforcing attendance of witness in civil proceedings in High Court of Justice. One mode of enforcing the attendance of a witness in civil actions, but which is also applicable to criminal cases, is by issuing a subpœna, which is a writ in the Queen's name, addressed to the witness and commanding him to attend at the time and place specified. A penalty is sometimes named in the writ, though it is not necessary. It is the service of the writ which creates a duty on the witness, who is not bound

[1] PLATO in his laws made it compulsory for a witness to attend, when duly cited to a court of justice; otherwise he became liable for the damages that resulted, and if any witness committed perjury a third time, and offered to give evidence again, he was to be punished with death.—*Plato, De Leg.* b. xi. The old Irish law required a property qualification for a credible witness.—1 *O'Curry*, 279. The compulsory nature of a witness's function was recognised in the time of Henry III.—*Stat. Prov.* 43 Hen. III. § 14.

[2] Shaw *v* Shaw, 2 Sw. & Tr. 517.

It is immaterial in what part of the kingdom a witness may be; he is equally bound to attend. He can be summoned from prison by appropriate writs.—R. *v* Friend, 13 St. Tr. 2. He may also be summoned from any part of the United Kingdom.—45 Geo. III. c. 92; 17 & 18 Vic. c. 34.

without such a compulsion to attend a civil trial, though in criminal cases he cannot insist on it.[1] A subpœna is nothing but a summons, and the writ summoning a witness is usually called a summons in some offices of the High Court, as well as in the exercise of judicial functions conferred by statute on particular courts and officers.[2]

Much strictness is required in the formality of the writ. It is necessary for the subpœna to specify the day of trial, but if the trial lasts several days, the writ will continue in force; though it is otherwise if the trial be postponed.[3] A fresh writ is necessary in the latter case, and it is incompetent to alter the date of the first writ.[4] In order to secure the witness's attendance, it is required, that the subpœna should be served a reasonable time before the day of trial, so that he may not be unnecessarily harassed and disturbed in his occupations, in order to comply with it.[5] In considering what is a reasonable time, it has been held that that is a question for the judge, but that it is settled, that the writ ought to be served at least on the day before the trial, or before he is required during the trial; and if not served till the morning of the day, it need not be attended to.[6] But the distance and convenience of travelling must always be elements for consideration on such a question. This length of notice is, however, for the protection of the witness, and may be waived by him, or it may be inapplicable to him, if he is already in court, or a spectator and disengaged.[7] The mode of serving a witness with this subpœna is by showing him the original, and also serving him with a copy; and as there is a serious punishment for disobedience, the service must be made personally.[8] To be able to show the original writ is absolutely necessary, for its effect is to interfere with personal liberty; and no man need attend to a message of this kind, unless reasonably satisfied of its authenticity.

[1] Bowles v Johnson, 1 W. Bl. 36; R. v Sadler, 4 C. & P. 218. [2] 15 & 16 Vic. c. 80, §§ 30, 31; 9 & 10 Vic. c. 95. [3] Scholes v Hilton, 10 M. & W. 15; Sydenham v Rand, 3 Doug. 429; Davis v Lovell, 7 Dowl. 178. [4] Barber v Wood, 2 M. & Rob. 172. [5] Hammond v Stewart, 1 Str. 510. [6] Barber v Wood, 2 M. & Rob. 172; Alexander v Dixon, 1 Bing. 366; 8 Moore, 387. [7] Maunsell v Ainsworth, 8 Dowl. 869; Jackson v Seager, 2 D. & L. 13; Pitcher v King, 2 D. & L. 755. [8] Garden v Cresswell, 2 M. & W. 319; Pitcher v King, 2 D. & L. 755.

And while the writ ought to give reasonably specific information as to the time and place of attendance, and the name of the suit or proceeding, yet the witness ought not to rely on critical objections founded on clerical or trifling mistakes.[1]

How far payment of witness's expenses required.—But though the law makes the duty of attending as a witness compulsory, it has at the same time provided, that the reasonable expenses of such attendance should be paid to the witness. What this reasonable expense is, is fixed by rules of court. And a distinction is made as to the right of the witness to demand payment of expenses beforehand, according as the trial is civil or criminal. In civil cases the witness is entitled to payment of reasonable expenses before he gives evidence; and unless he receives payment a reasonable time before the trial, he need not attend, and if he attend he may refuse to open his mouth, until payment is made.[2] It is, however, the business of the witness to make this demand, and if he waive his right to expenses either expressly or by conduct fairly implying such waiver, he cannot excuse himself afterwards from attending and testifying.[3] Considerable difficulty often arises as to a witness's remedy for the expenses of attending, if he is not paid beforehand. The fact of attending implies in the eye of the law a promise on the part of the person who summoned the witness to pay these expenses.[4] But the presumption is, that the party himself and not the solicitor employed is the person so liable, unless there is an express contract on the part of the latter.[5] In all cases, where there has been an express promise of the party summoning the witness, then the witness who has attended can sue on that promise for his expenses.[6] But he cannot recover more than the legal expenses for loss of time as defined in the scale of allowances applicable to the circumstances of such witness.[7] And if the witness's services

[1] Molson v Day, 3 M. & P. 333; Chapman v Davis, 1 Dowl. N. S. 239; 3 M. & Gr. 609; Page v Carew, 1 C. & J. 514. [2] Bowles v Johnson, 1 W. Bl. 36; Fuller v Prentice, 1 H. Bl. 49; Horne v Smith, 6 Taunt. 9; Newton v Harland, 1 M. & Gr. 956. [3] Betteley v McLeod, 3 Bing. N. C. 405; Goodwin v West, Cro. Car. 522. [4] Pell v Daubeny, 5 Exch. 955. [5] Robins v Bridge, 3 M. & W. 114; Lee v Everest, 2 H. & N. 285. [6] Hallett v Mears, 13 East, 15; Goodwin v West, Cro. Car. 522. [7] Collins v Godefroy, 1 B. & Ad. 950.

have never been required, and no inconvenience caused, the party may recover back the expenses already paid in prospect of attendance.[1]

In criminal cases, owing to their supposed greater urgency and importance, this right of the witness to an advance of the expenses was never recognised as a preliminary to his obeying the subpœna, and he cannot refuse to attend on the ground of such payment not being made.[2] But if poverty or the want of means to defray travelling expenses were satisfactorily established, no court could with reason punish him for not attending; and hence when the witness is summoned from a great distance, as, for example, Scotland, his expenses must be tendered in advance.[3] Owing to the lamentable want of method in everything relating to criminal prosecutions in this country, no provision was made for paying witnesses' expenses in such cases till the year 1732; after which date it began to be usual to provide for these in particular cases, the loss of time and money being felt grievously by all who assisted in this capacity.[4] And since then enactments authorising the payment of witnesses have accumulated. These expenses, though still not claimable beforehand or in advance, may nevertheless afterwards be reimbursed, along with the prosecutor's expenses, in all felonies and all the more serious misdemeanours.[5] And the expenses of attending the preliminary examination before magistrates are also now allowed, as well as the costs of attending justices when they exercise their summary jurisdiction in some indictable cases.[7] And when a witness is summoned in cases where expenses are allowable, he is not deprived of them merely by some mistake; and he is entitled to any incidental costs which arise out of the performance of his duty.[8] But as showing the want of method and system in this branch of the law, these rules as to costs of witnesses apply,

[1] Martin v Andrews, 7 E. & B. 1. [2] Pell v Daubeny, 5 Exch. 957; R. v Cooke, 1 C. & P. 322. [3] 45 Geo. III. c. 92, § 4. [4] 25 Geo. II. c. 36.

[5] 7 Geo. IV. c. 64; 14 & 15 Vic. c. 55; 24 & 25 Vic. c. 96, § 121; c. 97, § 214; c. 98, § 54; c. 99, § 42; c. 100, § 67; 30 & 31 Vic. c. 35; 33 & 34 Vic. c. 23.

[6] 29 & 30 Vic. c. 52. [7] 18 & 19 Vic. c. 126; 19 & 20 Vic. c. 118; 10 & 11 Vic. c. 82. [8] Re Mallison, 1 Lew. C. C. 132, 133; R. v Robey, 5 C. & P. 552.

not to all indictable offences, but only to the greater and more serious portion of them; and hence in those cases, which are not so included, the witness may be bound to attend at his own expense, as, for example, in prosecutions for keeping disorderly houses, for nuisance, libel, forcible entry, night-poaching, and some others. Nor are expenses claimable in any cases where the indictment is removed by certiorari into the Queen's Bench Division.[1] If the witness is summoned on the part of the accused, the expenses in every case of felony or misdemeanour have, since 1867, been allowed in like manner, subject to the qualification that the court shall think the evidence to be of consequence to the accused.[2] These expenses were at first payable out of the county and borough rate, but are now ultimately paid wholly by the consolidated fund, with some trifling exceptions.

Remedy for witness not attending in Supreme Court.—The remedies against a witness, who neglects to attend a trial or court after being duly summoned, are twofold:—(1) he may be committed to prison for contempt of court; (2) he may be sued for damages in a court of law.

Commitment of witness for disobeying subpœna.—One of the punishments of a witness, who after being duly served with process refuses to attend, is by imprisoning him under an attachment. For this purpose it is necessary to apply to the court promptly, and to satisfactorily show that the witness wilfully refused to answer, or was absent, or if the trial has not taken place, that he had not been ready to attend when required. This process has nothing to do with reimbursing the party any damages caused by the witness's absence, but is a mode of vindicating the dignity of the court, and making memorable any instance of slighting it; and hence some conduct on the part of the witness strongly implying disrespect must be shown in order so to punish him.[3] Thus it is required by those applying for this process to satisfy the court that they had done all that was required to be done. It is true that if it appears from the facts before the court, that the witness thus required was

[1] R. v Kelsey, 1 Dowl. 481; R. v Richards, 8 B. & C. 420; R. v Jeyes, 3 A. & E. 419; R. v Exeter, 5 M. & R. 167; 8 A. & E. 590.
[2] 30 & 31 Vic. c. 35, §§ 3, 4, 5; 32 & 33 Vic. c. 89, § 10. [3] Scholes v Hilton, 10 M. & W. 15; Horne v Smith, 6 Taunt. 10; Netherwood v Wilkinson, 17 C. B. 226.

unable to give any material evidence, and he had been summoned vexatiously, this summary process will not be issued against him.[1] Yet it is dangerous for a witness to decide this point for himself, and such a defence will not usually be listened to.[2] Nor will it be deemed any excuse that the witness could not obtain permission from his master, for the process of the court overrides all the exigencies of private business, and the master's interests must give way to the public interest.[3] But however flagrant may be the apparent contempt of court committed by a witness who refuses to attend or to answer, the process of imprisoning him for contempt is never issued without first giving him an opportunity of showing cause and urging, if he can, some satisfactory excuse.[4] And if the court is not satisfied after hearing the witness, it may either commit him to prison, or fine him a sum of money. While a witness who refuses to attend may be thus punished, it is obviously much the same ground of complaint, that when attending he refuses to swear. And Lord President Keble fined a witness 500*l.* and imprisonment during pleasure, for so refusing.[5] And while an almost unlimited power is placed in the hands of litigants to consider who shall be summoned as witnesses on their behalf (for no leave of court is ever required to control their discretion), it is necessary to make some distinctions, for otherwise persons may be harassed in their business and avocations on frivolous pretexts. It is on this ground that where high officers of state are summoned, and are sought to be fined or punished for non-attendance, the question, how far their evidence was reasonably necessary, comes to be material, because to allow them to be called away unnecessarily is an interference with the public business.[6]

Action against witness for not attending.—Another remedy against a witness, who, when summoned, refuses to attend the High Court, is an action of damages. An action of debt in such circumstances was expressly authorised by statute

[1] Dicas *v* Lawson, 1 Cr. M. & R. 934; R. *v* Russell, 7 Dowl. 693.
[2] Chapman *v* Davis, 3 M. & Gr. 609; Scholes *v* Hilton, 10 M. & W. 16. [3] Goff *v* Mills, 2 D. & L. 23. [4] Rule Pr. 1853, § 168.
[5] 5 St. Tr. 134. A limit has not been imposed by statute to the length of imprisonment on this ground.
[6] Dicas *v* Lawson, 1 C. M. & R. 934; R. *v* Russell, 7 Dowl. 693.

of Elizabeth, in which case the court had power to inflict a penalty of ten pounds, as well as award damages. But it proved to be so unusual a proceeding for a court to award damages, that this form of action has seldom been adopted, especially as the proceeding for attachment is usually available.[1] And yet when a court fines a party it exercises precisely the same kind of calculation as to the amount of mischief and relative loss. This action against witnesses for damages may be sustained, though the cause was not in fact tried, and therefore not lost, and without proving that the cause was well founded. All that is necessary to be proved is, that the witness was material, and that some damage was occasioned by his not attending at the time of hearing.[2]

Summoning witnesses in Parliament.—Where a witness is required before the House of Commons, the order is signed by the clerk and served or sent by post, and if disobeyed, the Speaker will issue his warrant, directing the Serjeant-at-arms to apprehend the witness, and, after being brought to the bar, he is usually committed to Newgate.[3] And the warrant of the House to commit need not state the particular reason for the committal on the face of it.[4] So the Speaker's warrant, addressed to a gaoler to bring up a prisoner, must also be obeyed;[5] or the High Court will send a *habeas corpus* to the gaoler for the purpose.[6]

And in like manner an order of the House of Lords, signed by the assistant clerk of Parliament, must be obeyed.[7] The Black Rod will be sent to apprehend any disobedient witness,[8] and if he cannot find him, the House may address the crown to issue a proclamation, offering a reward for the witness's apprehension.[9] In public matters the witness's expenses in both Houses are allowed by the Treasury; but in private matters the party requiring the witness's attendance is answerable for the expenses.

Witnesses before inferior courts and statutory judicial officers.—The processes, by which inferior courts, and officers and commissioners exercising judicial powers,

[1] 5 Eliz. c. 9, § 6; Pearson *v* Isles, 2 Doug. 556. [2] Mullett *v* Hunt, 1 Cr. & M. 752; Yeatman *v* Dempsey, 7 C. B., N. S. 628; 9 C. B., N. S. 881. [3] Gossett *v* Howard, 10 Q. B. 359. [4] Ibid. [5] 90 Com. J. 533. [6] Re Price, 4 East, 587; Re Pilgrim, 3 A. & E. 485. [7] 66 Lords J. 400; 21 & 22 Vic. c. 78, § 2. [8] 66 Lords J. 538, 400. [9] Ibid. 441.

enforce the attendance of witnesses, are modelled on the process of subpœna in the High Court. But as in all these cases there is no inherent power to call on one person to testify for the benefit of another, it requires statutory authority, either expressly or by implication, to be conferred for the purpose. And the rules as to punishment for disobedience and payment of expenses are similar; though, as regards fines, the power of the tribunal is limited to a small fixed sum, or the punishment is effected by resorting to the High Court for auxiliary powers. In the county courts, in which much of the inferior kind of litigation in civil matters is carried on, express power to summon and fine for disobedience the witnesses necessary to assist the administration of justice, was conferred by the statutes.[1]

Witnesses summoned by justices of the peace.—A vast variety of criminal and quasi-criminal business being done before justices of the peace, their compulsory powers over witnesses require particular notice, for the smaller the subject-matter for adjudication, the more irksome is the compulsion of attendance. The jurisdiction, which justices of the peace exercise, is twofold. They have the jurisdiction to entertain all charges for indictable offences, and to hear the evidence with a view to decide whether such evidence is *primâ facie* sufficient to authorise them to commit the accused for trial. Secondly, they have jurisdiction to convict parties, and make orders on them for payment of money, in a great variety of subjects. This is usually called the exercise of their summary jurisdiction, that is to say, it is the power to hear charges against persons, and to convict, and in certain events commit these to prison, the whole proceeding commencing and ending in petty sessions, and no other higher court requiring to confirm their decision.

Justices of peace enforcing witness's attendance in indictable cases.—When a justice sits out of sessions, as it is called, to hear charges for indictable offences, he may in all cases, on the oath of a credible person, issue a summons under his hand and seal to a witness, who is not likely to attend voluntarily. If this summons is

[1] 9 & 10 Vic. c. 95, §§ 85, 86; 19 & 20 Vic. c. 108. The fine for disobedience is ten pounds.

not obeyed, and no just excuse is offered for the neglect or refusal, then the justice may issue under his hand and seal a warrant to arrest and bring the witness before him. Or this warrant may be issued in the first instance without a previous summons, if the justice be satisfied on oath that the witness will not otherwise attend.[1] If the witness when so arrested, or when attending, shall refuse to be examined without giving any just excuse, the justice may, by warrant under his hand and seal, commit such witness to prison, there to remain for a period not exceeding seven days, unless in the meantime he consent to be examined.[2] The length of the imprisonment is thus defined by statute. Moreover when a witness has given evidence before justices on a preliminary hearing, as to the guilt of a person who is charged with an indictable offence, a usual mode of compelling the attendance of such witness at the next stage of the proceeding is for the justices to require him to enter into a recognisance. This recognisance is a bond, whereby the recognisor declares that he owes to the queen a certain sum of money, if he fail to appear and give evidence at the time and place specified in the condition.[3] This power of justices to bind over witnesses in criminal cases by recognisance was conferred by a statute of Philip and Mary, and is a useful part of the procedure.[4] The power to compel the witnesses to enter into such a recognisance is thus expressly conferred on all justices of the peace, before whom a preliminary hearing of a charge for an indictable offence takes place.[5] And it enables justices to bind the witnesses to appear, not only at quarter sessions and assizes, but also at a trial in the High Court.[6] And coroners have the same power, when an indictment for murder or manslaughter follows on the verdict of the coroner's jury.[7] And if the witness refuses to be bound over, that is to say, to enter into this recognisance, then he may be committed to the common gaol, or house of correction, where he is to remain till after the trial of the accused party, unless in the meantime he duly enter into the recognisance, or unless the accused party is not com-

[1] 11 & 12 Vic. c. 42, § 16. [2] Ibid. [3] Ibid., Sch. O. 1. [4] 1 & 2 Ph. & M. c. 13; 2 & 3 Ph. & M. c. 10. [5] 11 & 12 Vic. c. 42, § 20. [6] R. v Eyre, L. R., 3 Q.B. 487. [7] 7 Geo. IV. c. 64, § 4.

mitted for trial.[1] Hale and others went the length of saying that such a power as this of binding over witnesses was inherent in the very office of justices of the peace, being necessarily implied in their commission as well as the statutes of Philip and Mary.[2] The ground indeed put forward has been, that a witness must *ex necessitate* be kept in hand by some one for the purpose of trial.[3] Married women are also required to enter into their own recognisance, and an expressed determination not to attend is sufficient to justify their committal until the trial.[4] And an infant's recognisance, with or without sureties, is also obligatory.[5] But in no case is it compulsory for a witness to find sureties to enter into such a recognisance, since a person, from no fault of his own, may be utterly unable to find sureties. Hence, a justice is not justified in committing a witness merely on the ground that he offers his own recognisance, but not the recognisance of any other persons as sureties.[6]

The way in which a recognisance is enforced, is by estreating it in the event of the recognisor not fulfilling the condition by attending at the time and place specified. This will not however be done until the recognisor has had an opportunity of showing cause or explaining the reason of his absence; and unless the judges of the court, before which the trial was to take place, authorise the estreat. The effect of estreating the recognisance is, that a writ is sent to the sheriff to levy the sum on the goods of the recognisor, and, if enough cannot be found, then to imprison him till the sum be paid.[7]

Where witnesses are compelled to attend before justices in the preliminary examinations of prisoners charged with indictable offences, though such witnesses cannot insist beforehand on expenses, except such as are absolutely necessary for travelling, they are afterwards reimbursed and paid a sum for trouble and loss of time on charges of felony, and most of the charges for misdemeanours; but this was only provided for by a very recent statute.[8]

Justices enforcing attendance of witnesses at petty sessions.

[1] 11 & 12 Vic. c. 42, § 20. [2] 2 Hale, P. C. 282; Crompt. 125; Dalt. c. 168. [3] See Bennet v Watson, 3 M. & S. 1. [4] Ibid. [5] Ex p. Williams, 13 Price, 673; McClell. 493. [6] Evans v Rees, 12 A. & E. 59. [7] 22 & 23 Vic. c. 21, § 32. [8] 29 & 30 Vic. c. 52.

—The power of justices over witnesses is equally necessary to them in the exercise of their summary jurisdiction. When justices exercise their jurisdiction in petty sessions with reference to offences punished summarily, and with reference to orders made by them, they can summon witnesses to attend and direct their arrest and imprisonment in the same manner as on charges for indictable offences; with this difference, that a warrant to apprehend a witness will not be issued, unless it be shown that a reasonable sum for his costs and expenses had been tendered.[1] Though the attendance of witnesses is enforceable in aid of nearly all the miscellaneous duties of justices in reference to convictions and orders, yet a few special subjects are dealt with under other statutes, as the Bastardy Acts, the Customs and Excise Acts, the Poor Removal Acts. In these instances similar powers are given, but the power to apprehend the witness by warrant is not given in all cases, and instead thereof he is merely liable to be fined a fixed sum.[2]

Protection of witness from arrest during compulsory attendance.—As the attendance of a witness is a compulsory duty, the law endeavours to make that duty less irksome by throwing some protection around the witness when so engaged. This protection proved to be of no small consequence when the rule was, that persons could be arrested as a matter of course, and at any hour of the day, for debt; but, now that that rule is abolished, there is small occasion for the same indulgence. Nevertheless, sometimes this immunity of a witness may still be required in exceptional cases. The law was and still is, that a witness cannot be arrested on civil process of any kind while he is discharging his duty as a witness, that is to say, *eundo, morando, redeundo;* and whether he attend voluntarily or compulsorily, it makes no difference in respect of this protection.[3] In

[1] 11 & 12 Vic. c. 43, § 7. If the witness is not within the county, or is in Scotland, Ireland, or the Channel Islands, the warrant, after being indorsed by the judge or justice of the jurisdiction within which he is found, may be executed. This applies to indictable offences also.—11 & 12 Vic. c. 42, §§ 11-16; Ibid. c. 43, §§ 3, 7.

[2] A fine of twenty pounds for refusing to give evidence is the utmost punishment by the Customs Act.—39 & 40 Vic. c. 36, § 228. A fine of ten pounds for not attending the Inclosure Commissioners. —8 & 9 Vic. 118, § 9.

[3] Meekins v Smith, 1 H. Bl. 636.

ancient times a writ of protection was obtained to secure the witness from this molestation.[1] But latterly the courts themselves assumed to take judicial cognisance of this immunity, which naturally arose out of the compulsory discharge of a public duty, and they on motion interfered at once to enforce due attention to so cardinal a rule of procedure. Thus a reasonable time was allowed for the return of the witness from the court to his home.[2] And a slight deviation from the direct road was no reason for losing the privilege, for bailiffs were told by the court not to dodge their victim too closely.[3] Accordingly, whenever a witness was unlawfully arrested in these circumstances, the court, when the suit was depending in a superior court, or the court out of which the process issued, would on application discharge him; or he might be released by a writ of *habeas corpus*.[4] This privilege of the witness from being arrested was, however, never extended to protect him from criminal process, and thus practically was only a shield against creditors.[5] And as a consequence of such a rule, considerable difficulty has existed in distinguishing what was criminal process.[6] It was deemed however a privilege conferred for the advancement of justice, and therefore was not waived by the conduct of the party, and yet it was discretionary in the court to give effect to it.[7] And no action could be brought against the sheriff or his officer for a mistake, even though they had knowledge of the circumstances: the only remedy against these being an attachment.

Compulsory office of sheriff.—The office of sheriff, besides his other functions, is so closely connected with the administration of justice, that it is scarcely possible to try a cause, civil or criminal, or to execute a judgment and reap the fruits, unless he is ready to act. It is through him that all processes to arrest the person and seize the goods or the lands of a defaulting judgment debtor must go. He takes charge of prisoners, and summons jurors to their duties. He is the right arm of the law, which

[1] 13 Rich. II. c. 16. [2] Randall *v* Gurney, 3 B. & Ald. 255. [3] Strong *v* Dickenson, 1 M. & W. 491; Pitt *v* Coombes, 5 B. & Ad. 1078. [4] Ex p. Tillotson, 1 Stark. R. 470. [5] Re Douglas, 3 Q. B. 837. [6] Kimpton *v* L. & N. W. R. Co., 9 Exch. 766. [7] Anon. 1 Dowl. 158; Magnay *v* Burt, 5 Q. B. 393.

is powerless, unless its decisions can be carried into effect through his officers. It is through him that for five hundred years the *posse comitatus* has been brought to aid in subduing tumults and in enforcement of all legal process, whenever numbers are required to overawe the unruly and compel submission.[1] William the Conqueror, after a conspiracy in 1074, governed the provinces through sheriffs dependent on himself.[2] And Magna Charta recognised the sheriff as an officer of the king,[3] and from Henry II. to Magna Charta limits were put successively on his judicial powers. In 1259 he was selected from a list of four good men chosen in the county courts, and in 1262 the barons jealously guarded this right against the king; and under Edward I. it was contended that to elect to this office was an ancient popular right.[4] At first one sheriff used to act for two counties in a few cases, but one was afterwards appointed for each.[5]

Qualification of sheriff.—By statutes of early date it was settled, that none shall be a sheriff who has not sufficient land within the shire to answer the king and his people.[6] And it was always, or at least at an early period, taken for granted, that this office was a necessity of civil government, and that each should take the burden of it in turn. Hence an act of parliament is required to exempt from the office;[7] or some occupation incompatible with such service, as for example that of a practising solicitor or barrister.[8] It was found indeed inconvenient, that he should act as a justice of the peace, for in many respects his office requires him to carry out their decisions; and he was prohibited by statute in 1553 from acting as such justice during his year of office.[9] And this applies to general county as well as criminal business.[10] But when he happens to be a militia officer, he is expressly excused by statute from acting as sheriff during the time the

[1] 2 Hallam, Const. H. 133. [2] 1 Stubbs, C. H. 270. [3] Mag. Charta, c. 24. [4] 2 Stubbs, Const. H. 86, 207. [5] 8 Eliz. c. 16. [6] 25 Ed. I. st. 3, c. 13; 2 Ed. III. c. 4; 4 Ed. III. c. 9; 5 Ed. III. c. 4; 13 & 14 Ch. II. c. 21; 26 & 27 Vic. c. 125. [7] E. Shrewsbury's Case, 9 Rep. 46b.; R. v Larwood, 1 L. Raym. 29. [8] M. Norwich v Berry, 4 Burr. 2109. [9] 1 Mar. st. 2, c. 8. [10] Ex p. Colville, 45 L. J., M. C. 108.

militia is embodied, and his duties then devolve on the under-sheriff.[1]

By whom sheriff is appointed.—By the earliest law ascertainable, a sheriff was appointed by the county; but a statute of Edward III. enacted, that he should be nominated by the Chancellor of the Exchequer, Treasurer and Chief Baron, and the judges. A meeting of these high officers, called a meeting for the pricking of sheriffs,[2] is held on the morrow of St. Martin, when three persons are selected, and out of this list the crown nominates one. And the crown cannot nominate any one except from such selected list.[3] In the City of London, however, the office is a freehold and belongs to the citizens.[4] The clerk of the Privy Council, after the nomination, makes out a warrant, which confers all the powers of the office on the person selected.[5] The sheriff, when entering on his office, is required to take an oath, the form of which is prescribed by statute; and this oath enumerates a great variety of general duties of loyalty and integrity connected with his office.[6]

Sheriff refusing to serve.—If a person nominated refuse to take upon himself the office of sheriff, he is liable to an information or to indictment, since the refusal causes a stop to justice.[7] And it was even held that if he was unable by reason of excommunication to take the oaths and act, then he was liable to be fined for not getting rid of the obstacle, so as to serve.[8] He continues in office only for one year, for it was deemed likely to lead to oppression if he held so important an office longer.[9] It has been held a misdemeanour, if he do not reside in his bailiwick.[10] And one who has served the office shall not serve it again for three years, if there be another competent to act.[11] It was complained of in the time of Edward VI., that the sheriff was often impoverished by the expenses of his office, and some rough mode of reimbursement was described, though

[1] 38 & 39 Vic. c. 69, § 94. [2] 14 Ed. III. st. 1, c. 7. [3] 2 Inst. 559; Jenk. 229. [4] 23 Hen. VI. c. 8; Bac. Abr. Sheriff. [5] 3 & 4 Will. IV. c. 99, § 3. [6] 3 Geo. I. c. 15, § 18; 3 & 4 Will. IV. c. 99, § 6. [7] R. v Woodrow, 2 T. R. 731. [8] R. v Read, 2 Mod. 299. [9] 14 Ed. III. st. 1, c. 7; 28 Ed. III. c. 7; 23 Hen. VI. c. 8; 3 Geo. I. c. 15, § 21. [10] Long's Case, 3 St. Tr. 233. [11] 1 Rich. II. c. 11.

apparently never systematically acted on.[1] Before the time of Charles II., the sheriffs were expected to keep an open table at the assizes, and to make presents to the judges for their provisions, and gratuities for their officers, and to keep up much state; but the sheriffs were in that reign by statute prohibited from indulging in this profuse hospitality, and from keeping more than forty men, or less than twenty men-servants in livery at the assizes, and the penalty for disobedience of the statute was 200*l.*[2]

Compulsory municipal officers.—The duties relating to self-government in municipal boroughs must be discharged as well as those relating to the administration of justice, and a species of compulsion as to some of these offices still exists, and has existed from the most ancient times. The obligation to serve municipal office was, indeed, once enforcible by serious punishments. It is stated in old laws of the Cinque Ports that, if a person refused to serve as mayor or as jurat, which latter was an office corresponding to bailiff, justice, and overseer all in one, the people were to go to his house, and oust him as well as his wife and children, then close the windows, seal up and sequestrate the goods, till he submitted. And sometimes his house was pulled down and razed to its foundations.[3] It is to this day an essential feature of municipal government, that officers should exist from year to year; and the High Court will enforce by mandamus the election of the usual officers, if the machinery is allowed to stand still; all which machinery is fully described in the modern municipal corporation statutes.[4]

Every person who is qualified and who has been elected to the office of alderman, councillor, auditor, or assessor, and every councillor who has been elected to the office of mayor, must accept such office or pay a fine, not exceeding fifty pounds in the former cases, and 100*l.* in the last case.[5] And on payment of a like fine a person may resign any of such offices.[6] The qualification is defined by the statutes and usually consists in the possession of real or personal estate within the borough. If the fine is not paid, a justice may grant a warrant to enforce payment by distress,

[1] 2 & 3 Ed. VI. c. 4. [2] 14 Ch. II. c. 21, § 1. [3] 1 Lyon's Dover, 203. [4] 7 Will. IV. & 1 Vic. c. 78, § 26. [5] 5 & 6 Will. IV. c. 76, § 51. [6] 7 & 8 Will. IV. c. 104, § 8.

and if the goods are insufficient, then imprisonment may follow, but it is not to exceed two calendar months.[1] Infirmity of mind or body will be a good ground of exception, and so will the age of sixty-five years or upwards, or a previous service of the same office within five years previous.[2] This punishment of those who refuse to accept municipal offices is prescribed by recent statutes; but there is also a remedy by indictment or criminal information at common law for this neglect, and even a mandamus will be the ultimate punishment, to disobey which is to be liable to imprisonment.[3] As, however, the statute has prescribed an appropriate punishment, the court, in exercise of its discretion, will naturally refuse to help the parties by giving them another remedy.[4]

Compulsory office of constable.—The office of constable, though of high antiquity, has in modern times been confined to a more limited range of persons than its importance seems to require. The laws of Alfred in effect made it compulsory that every ten freeholders should choose an annual officer, called a constable, who was head of his decenary, and was sworn in before the feudal lord, or if there was no feudal lord, before the sheriff, and a like officer for the hundred was called the high constable.[5] There were afterwards doubts as to the power of choosing the constable. And a woman was equally bound to serve this office or to find a substitute. When justices of the peace were appointed in the time of Edward III., they naturally took the charge of this class of officers, who were pre-eminently peace officers, and their own ministers and servants, and appointed them when the sheriff or lord had failed to do so. And a statute of Charles II. recognised their right to do this.[6] When a constable was duly elected or appointed, he was liable to be fined for not serving, or he might be indicted.[7] Certain persons, whose occupations were incompatible, were, as is usual, partly by the courts or by statute, exempted from the office. And a statute of William and Mary exempted Dissenters, who scrupled to take the oaths,

1 5 & 6 Will. IV. c. 76, §§ 51, 129. 2 Ibid. c. 76, § 51.
3 R. v Bower, 1 B. & C. 585; Vanacher's Case, 1 L. Raym. 499, Carth. 400; R. v Leyland, 3 M. & S. 186. 4 R. v Hungerford, 11 Mod. 142; R. v Grosvenor, 2 Str. 1193. 5 Mirr. c. 1, § 3.
6 13 & 14 Ch. II. c. 12, § 15. 7 2 Hawk. P. C. c. 10, § 46.

from serving, if they found a deputy.[1] The office of high constable was abolished in 1869.[2] And the only persons now compelled to serve the office of constable are parish constables and special constables. But parish constables are seldom so compelled, since the supply of competent and willing persons can easily be secured without this compulsion. It is now only when the quarter sessions deem it necessary to do so, that parish constables require at all to be appointed. When so required, the justices make the appointment, and the person chosen becomes, on being served with a warrant of appointment, liable to serve the office.[3] Every able-bodied man resident in the parish, between the age of twenty-five and fifty-five, and rated at a sum of four pounds, is liable so to serve.[4] The overseers are charged with the duty of furnishing proper lists of the qualified persons, and each serves the office for a year, and need not serve again, till all the other qualified persons have served their turn.[5] If he fail to serve or do not find a qualified substitute, he still may be summarily fined or indicted.[6] And yet the constable is not compelled by law to remain in his parish for the whole year.[7] And though formerly the office was gratuitous, except that many fees were due for services rendered, it is now usually by express resolution made a paid office, and the payment made out of the poor-rate in places other than boroughs.[8] In boroughs and counties constables are not compulsory officers, but are appointed at their own request, and are paid on terms agreed.

Compulsory office of special constable.—But while there are few common constables now compelled to serve in that capacity, there are special occasions when a tumult or riot is apprehended, and when patriotism demands that power shall be given to justices to select, and that the persons selected by them shall be compelled to serve. These are called special constables. Whenever two or more justices, on the oath of a credible witness, are satisfied that a tumult, riot, or felony has taken place, or may be reasonably apprehended, the justices may nominate and appoint as many as they think fit of the householders or other

[1] 1 W. & M. c. 18. [2] 32 & 33 Vic. c. 47. [3] 35 & 36 Vic. c. 92. [4] 5 & 6 Vic. c. 109, § 5. [5] Ibid. [6] 33 Geo. III. c. 55, § 1; R. v Lone, 2 Str. 920; R. v Brain, 3 B. & Ad. 614. [7] Ibid. [8] 35 & 36 Vic. c. 92.

persons not legally exempt from serving the office of petty constable. These persons are to act as special constables, so long as the justices think fit, for the preservation of the public peace, for the protection of the inhabitants, and the security of property.[1] Moreover a secretary of state may for good reasons direct the lord lieutenant to cause special constables to be appointed and sworn throughout any part of the county, for a time not exceeding three months, and may signify that no person shall be excused by reason of any exemption.[2] If a person nominated a special constable refuse to take the oath, or refuse to attend at a place for taking it, unless he can prove sickness or unavoidable accident, a penalty of five pounds is imposed on him for each default.[3] And after the appointment the refusal to obey lawful orders and directions is punishable in like manner.[4] In boroughs and cities the same power to appoint special constables, who are compelled to serve, is given to justices.[5] But in both counties and boroughs a reasonable sum is paid to the special constable for his trouble, loss of time, and expenses; and this is paid out of the county rate and borough fund respectively.[6]

Compulsory office of churchwarden.—The office of churchwarden is one which relates exclusively to the Established Church, and it may be wondered how it can be ranked among compulsory offices, seeing that there is now no legal obligation to attend the church, or rather, non-attendance there cannot be punished, as it once was. And a vast number of the population, under the name of Dissenters, provide, attend, and manage chapels of their own dedicated to public worship; and these are wholly unconnected with the Established Church, and, indeed, repudiate all connection with it. Nevertheless, the constitution of this country, as at present arranged, includes an Established Church, which is subjected to restrictions professedly intended for the public good.[7] The Church and its

[1] 1 & 2 Will. IV. c. 41. [2] Ibid. § 3. [3] Ibid. § 7. [4] Ibid. § 8. [5] 5 & 6 Will. IV. c. 76, § 83. [6] 1 & 2 Will. IV. c. 41, § 13; 5 & 6 Will. IV. c. 76, § 83.

[7] It is, indeed, singular that the Church should once have thought of compulsory priests. In the early ages of Christianity, while popular elections prevailed in the Church, we read of persons being ordained against their will, and monks being seized by force and

buildings and lands absorb a great portion of the property of the country. Many of the uses of this property were originally intended for, and are yet to a large extent available for, the public generally; and so long as such property exists and holds out benefits for the public, there must be officers of some description to manage and administer it. As the administration of justice has the compulsory service of jurors and witnesses, as local self-government requires mayors and councillors, and as the maintenance of the poor requires the compulsory service of overseers, so the administration and care of at least the fabric of the church and of the churchyard requires the compulsory service of some members of the community, and those are known by the name of churchwardens.

Qualification of churchwarden.—The office of churchwarden is one which any inhabitant of the parish is liable to serve; and there seems no reason why an unmarried woman should be exempt. An inhabitant in this sense is any one who occupies in his own right a house in the parish, though he may not reside or sleep there.[1] Many exceptions, however, have been made to this liability, which have been created partly by statute and partly by the courts, owing to the occupations and character of the parties appointed. Thus peers, members of Parliament, justices of the peace, solicitors, aliens, Quakers, are exempted.[2] Roman Catholics and Protestant Dissenters were long ago expressly exempted by statute.[3] But the courts have refused to relieve a man who pleaded merely deafness,[4] or poverty.[5]

Nomination of churchwarden.—The practice, founded on the canons 89 and 90 of 1603, is, that the minister, or in his place the curate, shall choose one, and the parishioners in vestry choose the other churchwarden,[6] unless some immemorial custom of the parish varies the mode of

carried under a guard to be invested with the sacred office of a priest, —*Bingham, Christ. Antiq.* b. i. c. 7, until the practice was prohibited by the imperial laws and the canons of the Church.—*Leo, Novel.* 2, *in Append. Cod. Theod.*

[1] Stephenson *v* Langston, 1 Hagg. C. 379; R. *v* Spurrell, L. R., 2 Q. B. 72. [2] Anthony *v* Seger, 1 Hagg. 9; Adey *v* Theobald, 1 Curt. 447. [3] 52 Geo. III. c. 155; 1 Will. III. c. 13, § 1. [4] Cooper *v* Allnutt, 3 Phill. 165. [5] R. *v* Rice, L. Raym. 138; 1 Salk. 166. [6] Hubbard *v* Penrice, 2 Str. 1246.

appointment, as, for example, where the inhabitants choose both instead of one, which is a custom prevalent in the parishes of London.[1] Yet a custom cannot be set up, that no churchwarden at all shall be appointed, for this would nullify the law.[2] Statutes have also in special and in particular circumstances prescribed the mode of election.[3]

Enforcing service of churchwarden's office.—Though the compulsory character of the office of churchwarden was formerly justified by the fact, that the property whose care is assigned to him was devoted to uses in which all the public share, this theory has lost much of its application since Dissenters have been exempted from the burden, and have rights of their own of a substantial character. The office was once justified, not merely because the property would otherwise be wasted or neglected, but also because the churchwarden's duty was to look after the morals and behaviour of the whole parishioners. This latter ground, however, though once boldly laid down by a judge in 1752 as a reason for the compulsory character of the office, cannot be said to have now any substantial foundation.[4] Yet as the office of churchwarden is compulsory, the means of compelling the appointment necessarily exists; and when the minister or the inhabitants in vestry refuse, the court will grant a mandamus commanding them to appoint and elect a churchwarden.[5] But it has been decided that the vestry has the power of excusing a person once chosen to the office; and acting on this principle, many instances have occurred of persons paying a fine to the parish so as to escape the duty.[6] When a person duly elected refused to take upon himself the office, he was formerly liable to be excommunicated; and now that that process has been abolished, he may be arrested under a writ *de contumace capiendo.*[7]

[1] R. *v* Hinckley, 12 East, 361; Evelius' Case, Cro. Ch. 397. [2] R. *v* Wix, 2 B. & Ad. 197. [3] 1 & 2 Will. IV. c. 60; Ibid. c. 38; 6 & 7 Vic. c. 37, § 17; 58 Geo. III. c. 45, § 73; 8 & 9 Vic. c. 70, § 6. [4] St. Thomas *v* Treherne, 1 Lee, 127. [5] Ex p. Joyce, 3 E. & B. 178. [6] Birnie *v* Weller, 3 Hagg. 474.

[7] 53 Geo. III. c. 127; Gibs, Cod. 216. It seems a contumacious churchwarden may be kept in prison six months.

The specific duties and powers of churchwarden in reference to the church belong to the division of law intituled "Security of Public Worship."

Compulsory office of overseer.—The office of an overseer was created by the statute of Elizabeth,[1] when the duty was first imposed on each parish, and at a later stage on each township, of providing funds to maintain the poor, as is more fully described in the chapter relating to the "poor laws." That duty could only be discharged effectually by appointing officers, whose business it should be to collect the funds from the ratepayers, and apply these funds in the manner described by the statute. And it was left to the justices of the peace to nominate, or at least approve, not less than two and not more than four substantial householders to fill this annual office. No power was given by the statute to remunerate the overseers, and hence the office is gratuitous. However important may have been the office of overseer at the beginning of the poor law organisation, much of that importance has been taken away since the institution of poor law unions, the guardians of which dispose of the chief business appertaining to paupers. At the same time many miscellaneous duties have been during the last two centuries created and attached to the office of overseer, the proper discharge of which requires considerable knowledge of many intricate and difficult statutes, and the neglect of which is often attended with considerable liability. As the general statutes relating to the duties of the office of overseer are treated under the head of "poor laws," it is unnecessary to do more than refer to that part of this work for further details respecting it.[2]

Compulsory office of surveyor of highways.—The last of the compulsory offices now existing in this country is one relating to highways. For the purpose of managing the highways the inhabitants in vestry assembled are entitled to appoint a surveyor to act for the year.[3] He must live

In Queen Elizabeth's time a churchwarden was fined if he did not assess the farmers, in order to raise a sum to reward persons for destroying magpies, rooks, and hedgehogs. These hostile creatures were "crows, rooks, choughs, pies, stares, bullfinches, kingfishers, foxes, wildcats, hedgehogs, moles." The birds excepted were "hawks, herons, egrytes, swans, shovellers, doves."—8 Eliz. c. 10. It was also the churchwarden's duty to levy a shilling on all absentees from church.—1 Eliz. c. 2.

[1] 43 Eliz. c. 2. [2] See *post*, Chap. vi. "Poor." [3] 5 & 6 Will. IV. c. 50, § 6.

in the parish, and have an estate in lands in such parish, either in his own right or in the right of his wife, of the value of ten pounds a year, or must have personal estate of 100*l.*; or he must be an occupier of lands of the yearly value of twenty pounds, and in the latter case it is enough if he live in an adjoining parish.[1] If the parish is included in a highway district, then a person is elected in the same manner as a surveyor, and is called a waywarden; but his duties are similar, though not quite so extensive.[2] The effect of his appointment is, that he must either serve or provide a sufficient deputy approved by the justices, or he will forfeit, on conviction before two justices, a sum of twenty pounds.[3] It is true that he, and any inhabitant, may appeal to quarter sessions against the appointment.[4] The vestry, however, may, in lieu of an unpaid surveyor, nominate and elect any person of skill and experience to serve the office at a salary; and in lieu of an election by the vestry, as first mentioned, the justices may appoint a fit person as surveyor. If he refuse to act, he is subject to the same penalty; but it is left ambiguous whether he must be a person having property in the parish.[5] If the person, elected a surveyor, refuse or is unable to pay the penalty, and has no goods sufficient to supply such payment, then he is liable to be committed to prison for three calendar months with hard labour.[6]

Slavery as a compulsory service.—Having now enumerated all those duties and offices which may be said to be compulsory in this country, this chapter of petty as well as useful interferences with personal liberty may here end. All other acts and liabilities, which interfered directly or indirectly with the natural right or liberty of each to carry on his own employments in his own way, arise out of some contract or voluntary choice, or some crime or other illegal act, and may be said to be undertaken or brought on himself, and not to be chargeable to others.

[1] 5 & 6 Will. IV. c. 50, § 7.

[2] 25 & 26 Vic. c. 61, § 10. A surveyor of highways, so far back as the reign of Philip and Mary, was bound under a penalty to act. —2 & 3 Ph. & M. c. 8; 14 Ch. II. c. 6, § 2.

[3] 5 & 6 Will. IV. c. 50, §§ 7, 8. [4] Ibid. § 105. [5] Ibid. §§ 9, 11.

[6] 5 & 6 Will. IV. c. 50, § 103. The duties and powers of surveyors of highways belong to the subject of "highways," which is included in that division of the law intituled "The Security of Property.'

But there is still an important condition, which at one stage of progress in nearly every nation and community, at once concentrated all the evils and disagreeable incidents —all the bitterness and humiliation—of compulsion, and that was personal slavery. That was a state of life in which one human being was the tool and property of another human being—in which one was alone the dictator and alone in possession of a will and a discretion, and the other was used as a mechanical medium for obeying that will and giving effect to that discretion. It was a state in which one human being was degraded by another as low as the lower animals, was in almost every respect identified with cattle or mere articles of property. Though in modern times the very idea of personal slavery is blotted out, yet part of the condition of a slave consisted of certain personal services which might be severed from other incidents of the slavish state. These services may be bought and sold, accepted and given for a price or reward, and treated like an ordinary contract, discharged of all the odium and contempt which slavery inevitably carried with it. Such services are to a great extent now embodied in the contract of hiring, which, like other contracts, may be undertaken and carried out between man and man without any sense of degradation or inferiority on one side more than the other—in which each party stands at arm's length, and stipulates freely how far he is to be liable in any contingency and what risks and liabilities he encounters, if for any caüse he cannot or does not carry out his engagement. Though a contract of hiring now differs in few respects from other contracts, and must be treated in its order under the division of law relating to contract, yet, owing to the close connection slavery once had with the chronic and settled condition of compulsion, and the large figure that the change from that degraded state has made in history, it may be well not to close this chapter without some short account of the gradations, by which the slave became a freeman—how at last an indelible sense of equality among all degrees and orders of men and women has been attained and become the most familiar sentiment at the root of all law, and which when once experienced can never be relinquished. Though we can no longer even tolerate the faintest suspi-

cion of reverting to times of slavery any more than of going back to the basest conditions of the savage state, it is wholesome to remember from what low beginnings freedom has sprung, so that all nations and communities still groping in darkness and misery may see before them the shining heights to which they may aspire, and for which they must fight to all extremities, never losing sight of their final goal.

Universal prevalence of slavery.—In every age and country until times comparatively recent, personal servitude appears to have been the lot of a large, perhaps the greater, portion of mankind.[1] And though the ancients thought the Chians were the first, who resorted to it, it is idle to attempt to solve the question, how the mysterious gravitation towards this settled state of personal relations which all early societies have exhibited must have been brought about. The Mosaic law dealt with slavery as an institution then existing and requiring regulation. And even slavery at its worst has been deemed a mitigation of a still more barbarous state, when enemies were roasted and eaten, or at least indiscriminately put to death.[2]

[1] 1 Hallam, Mid. Ag. 197.

[2] Among the Jews, recorded in the Old Testament, slavery existed in two stages: one was the most abject or absolute slavery, the other was rather compulsory servitude for life: strangers were liable to the former, Hebrews to the latter.—*Exod.* xxi. 2. If a master killed the slave, the slave was avenged.—*Exod.* xxi. 20, 21. The slave could be redeemed.—*Levit.* xxxv. 47. And he had the option of his freedom in the sabbatical year.—*Deut.* xv. 12. And when discharged he was entitled to a stock of provisions.—*Deut.* xv. 14. If the slave was despoiled of a tooth, his injury was redeemed by instant freedom.—*Exod.* xxi. 26. Man stealing was a capital offence, but only when the stealing affected one of the Jewish nation.—*Exod.* xxi. 16; *Deut.* xxiv. 7. Not only were there slaves to persons, but slaves dedicated to God.—1 *Sam.* i. 11. A redeeming feature of Jewish slavery was, that each slave acquired freedom at the end of the seventh year, and was exempt from all work on the Sabbath day.—*Michaelis*, art. 127. Slaves were obtained, not only from capture in war, but from the practice of fathers selling their children and creditors selling their debtors.—*Michaelis*, art. 123.

In ancient Mexico no one was born a slave, though he could, from poverty, give himself up to slavery.—*Prescott's Mexico.* The Chinese and Javanese used also to gamble away their wives and children as slaves.—4 *Univ. Mod. Hist.* 477. The Chinese code, however, punished parents who sold their children.—*Staunton, Code*, 292.

The Greek and Roman slavery.—The Greek and Roman philosophers seem never to have risen higher than the fundamental assumption, that slavery was a natural and inevitable institution in all societies, but that slaves should be protected against unnecessary cruelty; and some steps were at last, and after long experience and delay, adopted to give effect to this latter view.[1]

Slavery in the early Christian centuries.—The progress of legislation for two hundred years after the conversion of Constantine did not much advance the protection of slaves.[2] The withholding of the status of marriage to the

The Loo Chew Japanese could sell themselves to slavery.—1 *Perry's Japan*, 226.

[1] PLATO said slaves, though entitled to kindness and justice, must be kept at arm's length, this being best for both parties.—*De Leg.* b. vi. c. 19. And slavery of Greeks was immoral, though not so as regards foreigners.—*Plat. Rep.* v. 14. ARISTOTLE assumed that slaves were born, and must remain slaves, and slaves must always exist.—*Arist. Pol.* b. i. c. 6.

The Spartans treated the Helots with contempt, clothed them in sheep-skin, with a dog-skin hat, flogged them once a year, that they might remember they were slaves, made them drunk as a warning to their children, and during the Crypteia sent their youths out by night to assassinate all the slaves they could find, so as to acquire dexterity in the assassin's art, and thin their redundant population. —*Plut. Lycurg.*

The Roman law divided all persons into freemen and slaves.—*Inst.* i. 3. Gaius says in all nations alike the master has the power of life and death over the slave, and whatever is acquired by the slave is acquired for the master.—*Dig.* i. 6, 2.

As GIBBON observes, at the call of indigence or avarice, the Roman father could dispose of his children or his slaves. Neither age nor rank, nor the consular office, nor the honours of a triumph could exempt the most illustrious citizens from the bonds of filial subjection.—*Gibbon, Rom. Emp.* c. 44.

Every Roman farm had its slave-prison, or *ergastulum*, for torturing and imprisoning the refractory and keeping them in chains, till Hadrian abolished it.—*Brisson, Ant. Sel.* ii. 9. Cato sold off his old slaves, and brought up young slaves for market, precisely as a racing-stud or cattle-farm is now managed.—*Plut. Cato.*

Antoninus was thought to have enacted a humane thing when he made the putting to death of one's own slave the same offence as killing the slave of another; and he allowed a slave to complain of the cruelty of his master, in which case the master could be ordered to sell his slave. Claudius made it murder to kill an infirm slave.—*Suet. Claud.* And it was enacted afterwards that slaves should be sold in families with parents, and that family relations were not severable.—*Cod.* 3, 38, 11.

[2] 2 Lecky, Hist. Mor. 67.

union of slaves, and the licence of torture, still remained as before. Though the early Christians did not see the true ground of the essential criminality of slavery, but rather accepted and recognised it as a dispensation of Providence, and merely tried to soften its rigours, yet an impetus was given by Christian practices and doctrines to the view of the natural equality of men. The early assembling of Christians on such footing of equality was what struck all governors as a fearful and wonderful thing, and fraught with revolutionary tendencies. Masters who tortured or seduced slaves were excluded from the communion. Every slave rose in dignity as the possessor of an immortal soul. The virtues extolled by Christianity were those which were most akin to the lowliest and suffering classes. The manumission of slaves on a large scale became a notable offering on Christian festivals. And the doctrine and practice of Christian charity gradually became general.[1] Under Justinian a great advance was made in the position of slaves. The restrictions on enfranchisement were abolished, and manumission was encouraged by the Christian Church. The state of freedman intermediate between slave and citizen was virtually abolished. A slave was permitted to marry a free woman with the authorisation of the slave's master, and children born in slavery became the legal heirs of their emancipated father. The rape of a slave woman was punished, like that of a free woman, by death.[2]

Anglo-Saxon slavery.—Tacitus says the ancient Germans could kill or chastise their slaves with impunity.[3] And that the same people would in their sports gamble away their own freedom and submit to be bound and sold.[4] Slavery was also a primitive institution of the Anglo-Saxon race.[5] Among the Anglo-Saxons the lowest class of peasants were sold like cattle and given away as presents, the heads of the church dealing in the traffic with equanimity. Fathers, if poor, could sell their sons to slavery for seven years, with their consent.[6] The children of slaves were slaves

[1] 2 Lecky, Hist. Mor. 70-73. [2] 2 Lecky, Hist. Mor. 69; Wallon, tome iii.; Champagny, Charité, p. 214. [3] Tacit. Germ. c. 25. [4] Ibid. c. 24. [5] 1 Stubbs, Const. H. 78; 1 Kemble, Sax. 185; 2 Sh. Turner, 96. [6] 1 Kemble, Sax. 199.

also. A slave might be whipped, or branded, or yoked to a team, or sold to foreigners, at the discretion of the lord. King Alfred was deemed to have made a great advance by procuring the wittenagemot to enact a law, that a Christian slave, if bought, should be free after serving six years, unless the latter consented to remain a slave, when the master might bore his ear at the church door, and so earmark him as his own property.[1] The laws of Cnut enjoined, that Christians were not too readily to be sold out of the land.[2] There was no civil punishment however for a master killing his slave.[3] Before the Norman Conquest the slave was still treated as a mere chattel, and what would now be deemed a trifling irregularity brought down upon him the punishment of death by hanging. The churl also who could not pay a penalty could be sold as a slave.[4]

English slavery after the Conquest.—The laws of William the Conqueror and Henry I. recognised the practice of manumission as existing.[5] And this is always an important mitigation of the general evil. At that time the lowest orders consisted of churls, or villeins, who cultivated a piece of ground and performed onerous services to the lord in respect of it. As these services became better defined and more certain, the villein rose in dignity, and this was the case by the time of Edward I.[6] Soon after the Conquest the name of slave proper had disappeared, and all of that class seemed to be recognised as villeins. Of these there were two kinds: the villein in gross, who was bound to the person of the lord, and the villein regardant, who was bound to follow the land which he tilled. But the one class was easily convertible into the other. When the manor was sold, the villeins regardant passed with it by implication of law. The deed poll by which he was sold described the piece of land, and certified that the villein was sold with it and all his issue, present and future, and all his goods.[7] This was also the practice throughout Europe, and the *coloni* could not be separated

[1] 1 K. Alfred's Life, 446. [2] Anc. Laws, Cnut, 162. [3] Anc. Laws, 272 n. [4] Ancient Laws of England, K. Ine 24; Athelstan, Pro-œm.; Leg. Will. Conq. iii. 15. [5] Anc. Laws, Will. Conq. iii. § 15; Hen. I. 78, § 1. [6] Dugd. Warw. 416, 457. [7] Britt. b. i. c. 32, § 5; Mirr. c. 2, § 28; Kennett, Par. Ant. 288.

and sold apart from the estate on which they worked.[1] The lord could indeed let out the villeins to serve others, and was entitled to the payment earned; and it was only by exceptional favour that they were allowed to keep the wages earned by serving others than the lord. There is some obscurity, however, as to whether the lord could or could not sever the villein regardant from the land.[2] While a lord could recover his villein as he could his ox, by an action of trover, it was equally true that imprisonment of a villein was as idle a distinction as the imprisonment of an ox.[3] And yet it was in course of time treated as murder for a lord to kill his villein.[4]

It is humiliating to reflect, that all the boasted liberties referred to in Magna Charta, which embodied the best thoughts of the most powerful men of the day, related only to free men, and that no notice, excepting in one small matter, was taken of the inferior beings called villeins, who remained so long afterwards in the condition of cattle. The Mirror says, the Great Charter omitted them because they had nothing to lose.[5] The champions of the liberty of the subject in the time of Charles I. equally forgot that their grand declamations all began and ended with themselves, and did not concern the down-trodden class beneath them. St. John and Littleton argued that they, the born freemen of the land, were treated by the crown and the crown's minions as no better than villeins.[6] And it never occurred to them

[1] Guizot, Civ. Fr. lect. 7. [2] Litt. § 181; 1 Pike on Crime, 327.
[3] Year B., 22 Ed. I. 446; 32 Ed. I. 55.
[4] Britt. b. i. c. 32. It would be idle to notice the frivolous distinctions that courts busied themselves with as to the presumptions of law for and against freedom. It was considered creditable that in England the child of a villein woman was free, if the father was free, contrary to the rule in Roman law.—*Britt.* b. i. c. 32, § 4; *Glanv.* b. v. c. 6; 1 *Hall. Mid. Ag.* 4. If villeins ran away, as they used to do, to the towns, or hid themselves as they best could, the lord could only reclaim them within a year and a day.—*Britt.* b. i. c. 32; 2 *Rot. Parl.* 21, 448: 9 Rich. II. c. 2. If once a villein became free, his issue became free.—*Britt.* b. i. c. 32, § 6. Unless it could be proved that a villein and his ancestors had been villeins from time immemorial, then the presumption of freedom prevailed. *Litt.* §§ 175–185; *Britt.* b. i. c. 31. This led to the practice of villeins, in defence, quoting Domesday Book to rebut the ancient user.—1 Rich. II. c. 6; 2 Rich. II. st. 2, c. 2.
[5] Mirr. c. 2, § 28. [6] 3 St. Tr. 86, 1263.

that the principles for which they so bravely contended should have embraced all conditions of their fellow men. Even Bacon seemed still to be labouring under the notion that villeinage was part of the law of nature.[1] And Coke alludes to villeins as miserable creatures, and scarcely recognises them as men at all.[2] Cook says in argument, that in the 11 Elizabeth, one Cartwright brought a slave from Russia and would scourge him cruelly, for which he was questioned, and it was resolved that "England was too pure an air for slaves to breathe in." [3] The principle embodied in this noble figure of speech, the recorded result of a resolution of the judges, seemed, however, not to sink as it ought to have done into the general conscience of the nation, and to have been logically carried out. But Lord Mansfield said that in the reign of Charles II. there were only two slaves left in England at the abolition of tenures, and the last confession of villeinage extant was in 19 Henry VI.[4]

Modern view of indefensible nature of slavery.—Guizot says, that it is going too far to say, that the abolition of slavery in the modern world was entirely the work of Christianity. A great development of new ideas was required to abolish this iniquity of iniquities.[5] The genius of Christianity, however, could not fail to sap and mine this pagan institution, and so it was noticed in the time of the Commonwealth.[6] The rising of Wat Tyler in 1381 struck a blow at villeinage, and the landlords gave up the

[1] Bac. Max. 11. [2] 2 Inst. 28. [3] 3 St. Tr. 1351; 2 Rushw. Coll. 468.

[4] 20 St. Tr. 78. DE TOCQUEVILLE says that in no part of Germany, at the close of the eighteenth century, was serfdom as yet completely abolished, and in the greater part of Germany the people were still literally *adscripti glebæ* as in the Middle Ages. Almost all the soldiers who fought in the armies of Frederick II. and of Maria Theresa were in reality serfs. As late as 1788 in most of the German states a peasant could not quit his domain, and if he quitted it he might be pursued in all places wherever he could be found, and brought back by force. He could neither improve his condition, nor change his calling, nor marry without the will of his master.—*De Tocqueville, Soc. in Fr.* b. ii. c. 1. Up to the time of *Somersett's Case* before Lord Mansfield (20 St. Tr. 79), there had been a tolerance in England of the practice of foreign masters controlling their slaves; and it is said they were sold openly on the Exchange and other places of public resort.—*Per L. Stowell*, 2 *Hagg. Adm.* 105.

[5] Guizot, Civ. Eur. Lect. 6. [6] T. Smith, Com. 250.

demand for base services, and ceased to reclaim truant villeins.[1] Wycliff had also inculcated, that slavery was contrary to the Christian religion.[2] Before slavery was finally abolished, there were timid reformers, who urged that it would be going quite far enough, if they were to regulate without absolutely abolishing it. Political freedom, however, when examined, was found to sink into nothing when compared with personal freedom. Burke said that he himself had papers prepared in order to advocate the regulation of slavery, but when Wilberforce's motion came on, he instinctively burnt them, as he read that the sorcerer's books were offered up and burnt at the approach of the gospel.[3] When an association was formed to abolish the slave trade, and the public mind was besieged with arguments, illustrations, and discussions, all pointing to one result, the essential iniquity of that trade was made self-evident. The resolute action of a few men of high character and humanity carried all before them by the aid of free discussion. In twenty years from first prohibiting the importation of slaves by subjects of the crown into foreign countries, parliament passed an act rendering all dealings in slaves felony.[4]

As the air of England is too pure for slaves to breathe in, it is a maxim or elementary principle discovered and created by statute, that no human being can have any kind of property in another human being, whether he is a native or a foreigner, and that all contracts, deeds, powers, and acts, which are founded on such a notion, are altogether void, to be disregarded and treated as if they never existed. No quarter can be given, no parley can be held with the doctrine, that slavery, or anything approaching it, was part of the law of nature, though it may have been part of the common law. The common law, indeed, had long strayed from the right path, and was lifted out of the mire by the legislature, which brought to bear higher views of morality and religion than the common law had ever before dreamt of. The rule, like a new informing soul, now pervades the law—that all men are free, and that it is an abuse of language to liken any relation that can exist between two

[1] 2 Stubbs, Const. H. 462. [2] Barringt. Stat. 311. [3] 29 Parl. Hist. 358; Acts xix. 19. [4] 46 Geo. III. c. 52; 5 Geo. IV. c. 113; 1 Clarkson's Hist. Slavery, 288; 1 Wilberf. Life, 139.

human beings to the relation of proprietorship. The analogy is and always was a false analogy. Property has no meaning when used between man and man as subject and object. There may be contracts and rights and wrongs arising out of mutual duties; but these are all made and rest on the footing of entire equality—each treating all others at arm's length—each exercising a discretion and choice, and at the worst submitting to the consequences of such choice. Slavery with all its distinctions and qualifications, its essential vices, its cruelties and oppressions, has been blotted out for ever from the book of civilisation. With it has fallen into oblivion a brood of monstrous and perverted fictions, the refuse of pagan practices adopted and imitated by courts that knew no better, and which no longer deserve to be named or remembered among men. It is true, that some niceties of conduct require still to be borne in mind where subjects of this country come in collision with the laws of other countries, and seem driven to choose between acting on one principle or its opposite. But these difficulties wholly belong to that division of the law, entitled "the security of foreigners," and require no further notice in this place. It is enough to say, that our law, within the limits of this country, knows no distinction between foreigner or native, and treats all human beings, whencesoever coming or going, as entitled to the same liberty. If any one is seized or imprisoned or kept in subjection within English territory, he can vindicate his freedom by the same well known remedies. The whole *posse comitatus*, all the civil and military resources of the country are at the command of any one human being, however insignificant, of any colour or race or origin, who chooses to invoke them, so that he may be at once restored to the position of a freeman, and so that he may treat all the rest of mankind at arm's length, and subject to no other qualifications than his own free contract, or what duties the law imposes on all alike, for their common good and equal protection.

Whether a contract to serve for life is valid.—The only remnant of what was once known as slavery may be said to be its modern shadow, a contract to serve another for life. A court of law in 1837, was persuaded to hold, that such a contract was valid, and that there seemed to be no

objection to it.[1] But the unanswerable objection to it is this, that now since all courts are in possession of the elementary axiom that slavery cannot exist, this involves the further proposition that no man can sell himself to slavery or renounce or abdicate the inherent rights of manhood, part of which is to keep his own freedom well in hand. He may contract in any way and every way he finds expedient for his own interest, subject only to a reasonable term of service. But a life contract is an absurdity. The utmost a court can consistently hold is, that the servant can if he pleases, and when he pleases, avoid a contract for life service; and unless a short term of a few years is specified, it will be treated as only a contract from year to year.[2]

Kidnapping and stealing human beings.—The stealing or kidnapping of an adult person is an offence seldom known in civilised countries, as it presupposes a degree of combination and defiance of law, which the vigilance of each individual, and the ready means of identification and protection supplied by settled communities usually baffle. As regards women and female children, indeed, the circumstances of civilised communities too readily give rise to offences now known under the name of abduction and child-stealing, and these are more fitly treated of under that chapter of variations in personal security caused by sex and infancy. As regards adult men, the attempts to kidnap or secrete these are usually punishable under the head of assault or false imprisonment, for which actions, indictments, or *habeas corpus* supply the remedies. In a less advanced stage of society, the crime of kidnapping grown persons was treated as a felony. But such a crime is now simply impossible, according to the fundamental maxim, that no human being can become the property of another; and hence the offence resolves usually into one of false imprisonment.[3]

[1] Wallis *v* Day, 2 M. & W. 273.

[2] The only authority relied on for the doctrine was a note of a case in Brooke's Abridgment, being a decision *temp.* Henry IV. (1400), a time when villeins were the order of the day, and when the courts had no more idea of the fundamental invalidity of slavery than Plato and Aristotle had.

[3] It has been said that it was no uncommon occurrence, so late as the commencement of the present century, for a man to sell his wife.—4 *Bl. Com.* (Christian's) 64 n. Such an offence is now simply an impossibility, whatever may be the ignorance or credulity

Penal servitude.—The case of penal servitude may in one sense be likened to slavery, but it is essentially different. It is only a form of punishment which is inflicted because it is deemed necessary for the preservation of society, that those who show a flagrant violation of the most vital of its laws, should be prevented by force from repeating such conduct, and be deprived of that power of doing mischief, which is necessarily incident to a state of freedom.[1]

of the persons, who suppose they go through the form of such a sale or purchase.

[1] 4 Bl. Com. 11; 2 Inst. 315; Beccaria on Cr. c. 29; Co. Litt. 116 b.; Bracton, 1, 6, 2. As to punishment and its varieties, see *post*, Chap. viii.

END OF FIRST VOLUME.